87-487

No. ____

Supreme Court, U.S.
FILED
SEP 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

WYOMING COMMUNITY DEVELOPMENT AUTHORITY, FIRST INTERSTATE BANK OF CASPER, N.A., and CITIBANK, N.A.,
Petitioners,

v.

MARVIN B. DURNING and JEAN C. DURNING, husband and wife, on behalf of themselves and all other persons similarly situated,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 21, 1987

ABCD Legal Printers, Seattle, WA

QUESTION PRESENTED

Where an investor asserts securities fraud claims arising out of the purchase of municipal bonds, claiming that he was misled by an accurate offering document attached to the complaint, does an objective standard of adequacy of disclosure under 15 U.S.C. § 78j, mandated by circuit court decisions and the doctrines enunciated by this Court, permit the district court to dismiss the claims as a matter of law?

LIST OF PARTIES

The petitioners, Wyoming Community Development Authority, Citibank, N.A., and First Interstate Bank of Casper, N.A., were appellees below.* The First Boston Corporation also was an appellee below. Respondents Marvin B. Durning, Esq., and Jean C. Durning, were appellants below.

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* Pursuant to Rule 28.1, a list of affiliates is in Appendix F herein.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Wyoming Community Development Authority (the "Authority"), First Interstate Bank of Casper, N.A., and Citibank, N.A. (collectively, "petitioners"), respectfully request that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit, entered on April 27, 1987.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit of which review is sought is reported at 815 F.2d 1265 (9th Cir. 1987), and is reprinted in Appendix A.[1] A petition for rehearing and rehearing *en banc* was denied

[1] References to the Appendices are hereinafter cited as "App. ____"

by separate unreported order, and is reprinted in App. B. The opinion of the United States District Court for the Western District of Washington is reported at 627 F. Supp. 393 (W.D. Wash. 1986), and is reprinted in App. C.

JURISDICTION

The respondents Marvin B. Durning, Esq., and Jean C. Durning (the "plaintiffs" or "Durnings") brought this securities fraud case in the district court, which had jurisdiction under 15 U.S.C. §§ 77v and 78aa and 28 U.S.C. § 1332. On January 7, 1986, the district court granted defendants' motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Durning v. The First Boston Corp.*, 627 F. Supp. 393 (W.D. Wash. 1986). The plaintiffs appealed and, on April 27, 1987, the court of appeals reversed. *Durning v. The First Boston Corp.*, 815 F.2d 1265 (9th Cir. 1987). Defendants timely requested rehearing on May 8, 1987, which was denied on June 23, 1987.

This Court has jurisdiction to review the judgment of the court of appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULES INVOLVED

The primary substantive statute and regulation involved are Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5. The primary procedural rule involved is Fed. R. Civ. P. 12(b)(6). All are reprinted in App. D.

STATEMENT OF THE CASE

A. Introduction

This appeal presents a fundamental question concerning the standard for determining adequacy of disclosure in securities fraud cases. Plaintiffs challenge certain redemptions of low and moderate income housing revenue bonds (the "Bonds") by the Authority. The offering document by which the Bonds were originally marketed (the "Official Statement") described the Bonds' mandatory redemption provisions fully and accurately. Pursuant to those mandatory redemption provisions, the Authority redeemed $27,950,000 of Bonds in June 1983 from unexpended proceeds of the Bond sale and $4,000,000 of Bonds in June 1985 from prepayments of mortgage loans.

The complaint alleged that plaintiffs were not advised of the possibility of mandatory redemption prior to 1991. The district court, applying an objective standard dictated by precedent, held that the provisions for mandatory redemption were adequately disclosed in the Official Statement and dismissed the complaint. The court of appeals, while purporting to apply an objective reasonable investor standard, in fact created and applied a subjective standard in measuring the adequacy of disclosure. Based on this subjective test, and giving plaintiffs the benefit of inferences inconsistent with the language of the Official Statement, it reversed the dismissal.

The question presented by this petition is whether the Ninth Circuit has, by its decision, rewritten the law of adequacy of disclosure under 15 U.S.C. § 78j(b), Rule 10b-5 and cases decided thereunder and has made it practically impossible to dismiss securities fraud claims as a matter of law.

B. Background

The Authority provides financing for the acquisition of housing by low and moderate income first-time buyers. It issued $75,000,000 of Bonds in December 1981 as part of that program. The Official Statement describing the Bonds advised investors of conditions under which three separate types of redemption could occur.[2] The plaintiffs purchased four Bonds, each with a face value of $5,000, a maturity date of June 1, 1996, and bearing tax-exempt interest at the annual rate of 13⅜ percent. One of plaintiffs' Bonds was redeemed[3] in June 1985 from mortgage loan prepayments under the mandatory redemption provision.

Despite unambiguous disclosures in the Official Statement, the complaint alleged that plaintiffs had not understood the Authority to have the power to redeem Bonds as early as June 1983. Plaintiffs claimed damages from the redemption based on the premature termination of tax-exempt interest payments on redeemed Bonds as well as a drop in the value of unredeemed Bonds in the secondary trading market.

Understanding the claims asserted requires brief descriptions of housing revenue bonds and of the Bonds.

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[2] The Official Statement described three kinds of redemption: (i) mandatory, (ii) sinking fund, and (iii) optional. App. E. This case involves only the mandatory redemption provisions.

[3] To "redeem" a bond is to pay its principal prior to its stated maturity date. Feldstein, Fabozzi & Longley, *Introduction to Municipal Bonds*, in I THE MUNICIPAL BOND HANDBOOK 8, 14 (F. Fabozzi, S. Feldstein, I. Pollack & F. Zarb ed. 1983)("I THE MUNICIPAL BOND HANDBOOK"). After redemption, of course, the bond ceases to bear interest. *Id.* at 16. A redemption may be "optional" (the issuer has the option to redeem) or "mandatory" (the issuer is required to redeem). *Id.* at 15.

1. Housing Revenue Bonds

Housing revenue bonds are a distinct type of municipal bonds. Mandatory redemption provisions are necessary and common features of housing revenue bonds,[4] which rarely, if ever, provide investors with absolute protection from redemption until a date certain.[5]

Under a housing revenue bond program, the housing authority issues bonds at a fixed rate and uses the proceeds of the bonds to purchase home loans made by financial institutions to qualifying home buyers. The housing authority applies the monthly mortgage payments it receives from the home buyers to pay the principal of and interest on its bonds. The housing authority has no control over either the demand for the home loans or the life of the home loans once made: the financial institutions may be unable to place loans for the authority to purchase, or the loans may be prepaid by the home buyers in advance of maturity.

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[4] [S]ome bonds have a *mandatory call* in which, if certain criteria are met, the issuer must redeem the bonds whether interest rates rise or decline. This type of call provision is most often used in housing revenue bond issues. The condition used to determine if these bonds will be called is the mortgage prepayment rate—a reflection of homeowners paying off their mortgages when they sell their homes. Once a certain amount of mortgages is prepaid, the issuer, under the bond indenture, may have to use the prepayment monies to redeem bonds.

Feldstein, Fabozzi & Longley, *Introduction to Municipal Bonds*, in I THE MUNICIPAL BOND HANDBOOK 8, 15 (footnote omitted) (emphasis in original).

[5] Protection from redemption until a date certain is commonly referred to as "call protection." Feldstein, Fabozzi & Longley, *Introduction to Municipal Bonds*, in I THE MUNICIPAL BOND HANDBOOK 8, 14. Frequently, holders of a series of bonds are protected from certain types of redemptions, or calls, and not other types. *See id.* at 15.

This lack of control over both the origination and the life of the loans creates problems requiring redemption when interest rates decline from the date of the bond sale. Home buyers may turn to other sources of money for their home loans and the housing authority will be left with "unexpended proceeds" of the bond sale.[6] Those who have borrowed may refinance or prepay their loans, paying the housing authority the principal due on the mortgage loans and leaving it with a fund of "prepayments."[7]

In both situations, the housing authority holds a pool of money equivalent to the principal amount of its bonds as its asset to repay both the principal and interest on those bonds. Since, by definition, prevailing interest rates have dropped, the housing authority is placed in the impossible position of,

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[6] If a sufficient number of commitments is not received prior to the end of the commitment period, the unused portion of the bond issue is used to call bonds in accord with the extraordinary mandatory redemption feature of the bond issue.

Rosenberg & Austen, *Single-Family Mortgage Revenue Bonds*, in II THE MUNICIPAL BOND HANDBOOK 228, 241-42 (S. Feldstein, F. Fabozzi & I. Pollack ed. 1983) ("II THE MUNICIPAL BOND HANDBOOK"). As the district court observed in this case,

> [T]he Authority cannot predict the amount of bond proceeds that will be used to purchase mortgages. The demand for the [Bond] proceeds depends upon the demand for mortgages, which in turn depends upon the demand for single family housing.

627 F. Supp. at 396 n.3, App. C at 9-10 n.3.

> [T]he asset created in a single-family bond program is an unknown entity to the investor . . . [T]he bond issuer has no control over the life expectancy of the asset (mortgage loans). . . .
>
> While the mortgage loans and the mortgage bonds can be structured to mature at the same time, mortgage loans are often prepaid.

Rosenberg & Austen, *Single-Family Mortgage Revenue Bonds*, *in* II THE MUNICIPAL BOND HANDBOOK 228, 232-33.

for example, paying debt service on bonds bearing interest at 13% while earning only 11% interest on its invested funds.[8] As a matter of economic necessity, then, the issuer must be able to redeem an amount of bonds equivalent to unexpended proceeds and prepayments:

> The typical procedure used by bond issuers to shorten the life of a bond is to exercise a call feature. A call feature allows the issuer to retire bonds prior to their stated maturity. The call feature used by single-family bond issuers to control asset-bond life is known as "extraordinary mandatory bond redemption." Extraordinary mandatory bond redemptions require issuers to retire bonds at par prior to maturity, as opposed to the more common optional call which is exercised at a premium.

Rosenberg & Austen, *Single-Family Mortgage Revenue Bonds*, in II THE MUNICIPAL BOND HANDBOOK 228, 238.[9]

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[8] As the district court noted,

> If [non-origination or prepayment] occurs, the Authority must have the ability to reduce the number of outstanding bonds because it will not be able to generate sufficient funds from remaining mortgage payments to meet debt service obligations. The right to redeem the bonds under these circumstances makes the program economically sound and default less likely.

627 F. Supp. at 396 n.3, App. C at 9-10 n.3.

[9] In the municipal bond industry generally, a mandatory redemption to be triggered by the occurrence of certain specified events is denominated an "extraordinary mandatory redemption." Rosenberg & Austen, *Single-Family Mortgage Revenue Bonds*, in II THE MUNICIPAL BOND HANDBOOK 228, 238. It is common when the payment of the bonds is secured or produced by an asset which may be damaged or destroyed, and requires the issuer to redeem bonds upon such damage or destruction. Buschman & Gibbons, *The Legal Framework for Revenue Bonds*, in II THE MUNICIPAL BOND HANDBOOK 98, 116.

2. The Bonds

The Official Statement summarizes in detail the terms of the Authority's contract, as contained in the trust indenture and in the Bonds, with the Bondholders.[10] The Official Statement advised those who read it of the possibility of mandatory redemption in its very first paragraph:

> The Bonds will be subject to redemption prior to maturity as more fully set forth herein, including mandatory redemption at par from unexpended proceeds, prepayments and certain revenues.

App. E at 1-2.

Under three separate italicized headings, the text of the Official Statement described in detail the conditions for each of three discrete types of redemption. It advised that sinking fund redemption could not occur until June 1, 1994, and specified dates thereafter on which scheduled amounts of Bonds were required to be redeemed.[11] It advised that op-

[10] The trust indenture (or bond resolution) and the bonds themselves constitute the issuer's contract with its bondholders. 5 E. McQuillin, MUNICIPAL CORPORATIONS § 319.41, at 463 (3d ed. 1981).

[11] The Official Statement provided that for Bonds due in June, 1996, in part:

> *Sinking Fund Redemption.* The Bonds due June 1, 1996, will be subject to mandatory redemption prior to maturity, in part by lot on any June 1 *on and after June 1, 1994*, at a redemption price equal to 100% of the principal amount thereof plus interest accrued to the redemption date, from sinking fund installments which are required to be paid in amounts sufficient to redeem on June 1 of each year the principal amount of such Bonds specified for each of the years shown below:
>
> | Year | Amount |
> |---|---|
> | 1994 | $3,060,000 |
> | 1995 | 3,480,000 |

App. E at 3 (latter emphasis added).

tional redemption could not occur until June 1, 1991, and specified the price which Bondholders would be paid if the Authority elected to use this form of redemption at specified times.[12] In sharp contrast, the Official Statement stated no dates before which mandatory redemption could not occur:

> *Mandatory Redemption at Par.* The Bonds will be subject to mandatory redemption at a redemption price equal to 100% of the principal amount of the Bonds to be redeemed, plus interest accrued to the redemption date, from amounts on deposit in the Mandatory Redemption Account representing (i) Bond proceeds deposited in the Program Fund and remaining unexpended on May 1, 1983, (ii) Prepayments of Mortgage Loans . . . .

App. E at 4. In fact, the Official Statement went on to advise potential investors that one of the events triggering mandatory redemption, the level of prepayments, was difficult to predict:

> Due to the many factors which influence economic and financial market conditions, the Authority is not able

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[12] The Official Statement provided in part:

> *Optional Redemption.* The Bonds will be subject to redemption, at the option of the Authority, on any interest payment date *on and after June 1, 1991*, either as a whole or in part, at the optional redemption prices, expressed as percentages of the principal amount set forth below, plus interest accrued to the redemption date:

Redemption Period (Both Dates Inclusive)	Optional Redemption Price
June 1, 1991 to May 31, 1992	102 1-2%
June 1, 1992 to May 31, 1993	102
June 1, 1993 to May 31, 1994	101 1-2
June l, 1994 to May 31, 1995	101
June 1, 1995 to May 31, 1996	100 1-2
June 1, 1996 and thereafter	100

App. E at 5 (latter emphasis added).

> to predict with any significant degree of reliability the expected level of prepayments it will actually receive on the Mortgage Loans. *To the extent that prepayments occur, the Authority is required by the Indenture to apply amounts received to the redemption of Bonds.*

App. E at 6-7 (emphasis added).

Because mandatory redemption was required based on economic circumstances both beyond the Authority's control and which would endanger its ability to repay the Bonds, it was not conditioned on calendar dates. Instead, in keeping with the well-known purpose of mandatory redemption provisions in housing revenue bonds, the Authority fully disclosed that the timing of mandatory redemption was unpredictable.

3. District Court Proceedings

Plaintiffs brought this action against four named defendants,[13] asserting class action allegations on behalf of those who purchased Bonds prior to the 1985 redemption.[14] They alleged that the Official Statement, which was attached to the complaint, was misleading because it did not use the words "at any time" in its description of mandatory redemption.[15] Although the Durnings alleged personal losses of $6,250, their

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[13] The defendants were the Authority, First Interstate Bank of Casper, N.A. (the bond fund trustee), Citibank, N.A. (the paying agent), and The First Boston Corporation (the lead underwriter). 627 F. Supp. at 394, App. C at 2.

[14] The class was not certified prior to the district court dismissal.

[15] Plaintiffs alleged a plethora of claims, all premised on the allegedly misleading disclosure. The claims included violations of federal and state securities laws, the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§ 1961-1968) ("RICO"), negligent misrepresentation, breach of contract, tortious breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and unjust enrichment.

class action claims could be read to seek $96,000,000 in damages.[16]

The district court concluded that the allegations of the complaint were not supported by the text of the Official Statement, and that the Authority had adequately disclosed the provisions concerning mandatory redemption. It relied on three sections of the Official Statement, all quoted above: the first paragraph, notifying investors that the Bonds were subject to "mandatory redemption at par from unexpended proceeds, prepayments and certain revenues[,]" 627 F. Supp. at 395, App. C at 7; the section describing the conditions for mandatory redemption in the event of Bond proceeds remaining unexpended after May 1, 1983, or of receipt of prepayments of mortgages, *id.* at 395-96, App. C at 7-9; and the section warning investors that the Authority was unable to predict the level of prepayments, but that prepayments were required to be applied to redemption of Bonds, *id.* at 396, App. C at 9. *See* "STATEMENT OF THE CASE-Background-The Bonds" *supra*. The district court construed these three sections to:

> unambiguously inform the investor that mandatory redemption may take place at any time the mandatory redemption account has sufficient funds.

Id. at 396, App. C at 9. It dismissed the complaint.

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[16] The Durnings alleged that the mandatory redemption of their $5,000 Bond cost them $4,000 in lost interest from its redemption date to its maturity date. Assuming damages of 80% of the face amount of the Bonds asserted by each of the holders of the $31,950,000 amount of Bonds mandatorily redeemed in 1983 and 1985, the potential claim is for $25,560,000. The Durnings also alleged that the value of their three unredeemed Bonds dropped $750 per $5,000 Bond in the secondary market, leaving a potential additional claim of $6,457,500 for the $43,050,000 of unredeemed Bonds. This results in a total claim of $32,017,500; since RICO includes a provision for trebling of damages, 18 U.S.C. § 1964(c), App. D at 6-7, the potential claim could be $96,052,500.

4. Court of Appeals Proceedings

The Ninth Circuit reversed. In initially formulating a test for measuring the adequacy of disclosure (an issue which this Court has yet to address), it properly stated an objective test, i.e., whether there was a "substantial likelihood" that a "reasonable investor" *would* be misled. 815 F.2d at 1268 n.4, App. A at 14-15 n.4. Petitioners do not quarrel with the Ninth Circuit's formal statement of the test for adequacy of disclosure. Petitioners vigorously take exception to that court's failure to apply that objective test and the propriety of its substitution of what is in effect a *subjective* test—whether a reasonable investor "might" be misled. 815 F.2d at 1269, App. A at 20. This "might" standard is inconsistent with doctrine adopted by this Court and differs from the reasonable investor standard employed by other circuits. Furthermore, in applying Rule 12(b)(6), the Ninth Circuit held that the district court could not rely on the clear written disclosure, but was required instead to assume that an investor might misread the disclosure or would read it in an unreasonable way. 815 F.2d at 1269, App. A at 20-21.

The Ninth Circuit's analysis of the Official Statement reveals the impractical burden placed on issuers by a subjective test. The court acknowledged that the Official Statement nowhere stated time limits on the mandatory redemption provisions. 815 F.2d at 1269, App. A at 20. Furthermore, it did not suggest that the disclosure of mandatory redemption, fairly read, was misleading. Rather, it assumed that a reasonable investor *might* be confused, and infer the applicability of the 1991 time limitation set forth for optional redemptions to the section on mandatory redemption:

> By contrast, there are no specific redemption dates in the subdivision entitled "Mandatory Redemption at Par" and

> no tables. Instead, the text describes a "Mandatory Redemption Account." A jury could conclude that a reasonable investor *might* fail to understand that the bonds are redeemable under this section whenever funds in the Account are sufficient. The warning on page 16 that the Authority is not able to predict when it will actually receive prepayments of the mortgage loans may alert the investor that the time of redemption is uncertain, however, it does not necessarily alert the investor that such redemption can occur prior to 1991.

815 F.2d at 1269, App. A at 20-21 (emphasis added). The court remanded for further proceedings. *Id.* at 1270, App. A at 24.

This Court thus provides the only redress before petitioners will be required to spend years in litigation regarding class certification, discovery, trial and appeal—all with respect to a written disclosure which was both attached to the plaintiffs' complaint and adequate on its face.

REASONS FOR GRANTING THE WRIT

The court of appeals has applied a standard for adequacy of disclosure in a manner which is at odds with the law of the other circuits and the clear doctrine of this Court's decisions. It is a standard which is inconsistent with the realities and capabilities of modern financial markets, and will require that offering documents be addressed to the subjective perceptions of each of millions of potential investors. Application of this standard will not result in a better informed investment community. To the contrary, the result will be needlessly detailed disclosure documents which confound and overwhelm, rather than inform, the investor. For the petitioners, the result will be massive, expensive and complex litigation over fanciful claims. The Ninth Circuit's decision also sets a standard for

motions to dismiss under Fed. R. Civ. P. 12(b)(6) which is at odds with that set by other circuits, and which will subject issuers to strike suits on unreasonable interpretations of written disclosures.

In short, the Ninth Circuit decision is in conflict with the decisions of other circuits, justifying review pursuant to Rule 17.1(a). Furthermore, it has decided an important question of federal law which has not been, but should be, decided by this Court, justifying review under Rule 17.1(c).

The courts should be permitted to dismiss any securities fraud claim premised on inadequacy of disclosure which fails to present a substantial likelihood that a reasonable investor in a particular market would be misled. Where the claim of inadequate disclosure is based on a document which is objectively accurate, the court should be empowered to dismiss the claim summarily.

A. The Result in this Case Will Have a Far Ranging Impact on a Significant Financial Market.

The law established by this case is important, affecting an enormous market. In 1985, for instance, $223,446,686,759 in long- and short-term municipal bonds and notes were originally issued.[17] Of these, $36,780,000,000 were issued as tax-exempt housing bonds.[18] Single-family housing revenue bonds constituted $15,570,000,000 in new issues in 1985[19] and were sold by issuers in 48 states, Puerto Rico and the Virgin Islands.[20]

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[17] The Bond Buyer 1985 MUNICIPAL STATBOOK 9 (1986).

[18] *Id.* at 42.

[19] *Id.*

[20] *Id.* at 43.

B. The Adequacy of Disclosure Is an Important Federal Question Which This Court Has Yet to Resolve and About Which Circuit Courts Are Now in Conflict.

To state a claim under federal securities laws, a plaintiff is required to show a misleading statement made with scienter, upon which he relied to his damage. 15 U.S.C. § 78j(b), App. D at 1-2; 17 C.F.R. § 240.10b-5, App. D at 3; *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, *reh'g denied*, 425 U.S. 986 (1976). The inquiry is an objective one: whether a reasonably diligent investor would have been misled regarding facts which would hold a substantial likelihood of investor concern. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th Cir. 1982); *see also Lucas v. Florida Power & Light Co.*, 765 F.2d 1039 (11th Cir. 1985) (court dismissed claims where subjective interpretations differed from written document) ("*Lucas*"); *cf. TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) ("*TSC Industries*") (materiality judged by reasonable investor standard under 17 C.F.R. § 240.14a-9).[21] This case involves the test for determining whether a fact is adequately disclosed.

1. The Ninth Circuit Did Not Apply the Proper Standard for Adequacy of Disclosure.

In the present case petitioners conceded for purposes of the motion to dismiss that provisions concerning redemption were material. The sole issue is thus whether the Official Statement adequately disclosed the fact and timing of mandatory redemption. Although adequacy of disclosure "is a mixed question of law and fact," 815 F.2d at 1268, App. A at 15, it may nevertheless be appropriate for summary disposi-

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[21] Although *TSC Industries* involved disclosure under Rule 14a-9, 17 C.F.R. § 240.14a-9, the Court noted the ties to the same standard under Rule 10b-5. 426 U.S. at 449 n.9.

tion. *Securities and Exchange Comm'n v. Savoy Industries, Inc.*, 587 F.2d 1149, 1166 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979) ("[I]n the last analysis, it remains an objective question, and it may be resolved as a matter of law when reasonable persons could not differ . . . .") (citations omitted). The court can and should engage in a "meticulous and well articulated analysis of each item of withheld or misrepresented information," and in proper circumstances, take the issue of adequacy from the jury. *Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th Cir. 1982); *Associated Builders, Inc. v. Alabama Power Co.*, 505 F.2d 97, 100, 101 (5th Cir. 1974) ("*Associated Builders*"). Such summary disposition can serve an important substantive role in the law. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-41, *reh'g denied*, 425 U.S. 986 (1975).

Although the standard for measuring the adequacy of disclosure is an issue which has not yet been directly addressed by this Court, this Court's interpretation of various provisions of securities law makes clear that the standard is an objective one. The Ninth Circuit, relying on this Court's analysis in *TSC Industries*, purported to formulate an objective standard: whether there is a substantial likelihood that a reasonable investor would be misled. Unfortunately, in applying this test, it directly contravened *TSC Industries* by phrasing the question in terms of whether a reasonable investor "might" be misled:

> A jury could conclude that a reasonable investor *might* fail to understand that the bonds are redeemable under this section whenever funds in the Account are sufficient. The warning on page 16 [of the Official Statement] that the Authority is not able to predict when it will actually receive prepayment of the mortgage loans may alert the investor that the time of redemption is uncertain, however, it does *not necessarily* alert the investor that such redemption can occur prior to 1991.

815 F.2d at 1269, App. A at 20-21 (emphasis added).

This Court made clear in *TSC Industries* that the distinction between the objective "would" and the subjective "might" is not mere tilting at windmills, but has a basis in substantive securities law:

> Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good. The potential liability for a Rule 14a-9 violation can be great indeed, and if the standard of materiality is unecessarily low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking. Precisely these dangers are presented, we think, by the definition of a material fact adopted by the Court of Appeals in this case—a fact which a reasonable shareholder *might* consider important. We agree with Judge Friendly, speaking for the Court of Appeals in *Gerstle*, that the "might" formulation is "too suggestive of mere possibility, however unlikely."

TSC Industries, 426 U.S. at 448-49 (emphasis in original).

In addition to the deleterious effect that subjective standards have on the quality of disclosure, this Court has recognized that such a standard needlessly exposes securities issuers (and investors)[22] to a substantial threat of strike suits:

> There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general.
>
> . . .

[22] Ultimately, too low a standard of liability under Rule 10b-5 "will lead to large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyers." *Blue Chip Stamps*, 421 U.S. at 739 (quoting Judge Friendly).

> [I]n the field of federal securities laws governing disclosure of information even a complaint which by objective standards may have very little chance of success at trial has a settlement value to the plaintiff out of any proportion to its prospect of success at trial so long as he may prevent the suit from being resolved against him by dismissal or summary judgment. The very pendency of the lawsuit may frustrate or delay normal business activity . . . .
>
> . . .
>
> The potential for possible abuse of the liberal discovery provisions of the Federal Rules of Civil Procedure may likewise exist in this type of case to a greater extent than they do in other litigation.[23]

Blue Chip Stamps, 421 U.S. at 739-41. Thus, it is imperative that the federal courts employ objective standards when considering summary dismissal of these claims.

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[23] This prediction is borne out by this case. In a case involving only written disclosures which plaintiffs already have, they have served a 56 page discovery request on defendants seeking detailed information concerning defendants' corporate organization, activities, professional advisors, securities holdings, and the subject matter, participants, and documents reflective of every meeting *ever* held regarding any of the Authority's bond issues. As the *Blue Chip Stamps* Court noted:

> The prospect of extensive deposition of the defendant's officers and associates and the concomitant opportunity for extensive discovery of business documents, is a common occurrence in this and similar types of litigation . . . [T]o the extent that it permits a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an in terrorem increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.

421 U.S. at 741.

In determining whether a reasonable investor would be misled, the courts have formulated a variety of rules, all of which the Ninth Circuit violated in its analysis and decision in this case.

a. The reasonable investor is assumed to have an elementary understanding of the stock market.

The reasonable investor is presumed to have a general understanding of the business world and at least an elementary understanding of the stock market. *Greenapple v. Detroit Edison Co.*, 468 F. Supp. 702, 708-09, 710 (S.D.N.Y. 1979), *aff'd*, 618 F.2d 198 (2d Cir. 1980). The court may judicially notice such matters. *E.g., Zerman v. Ball*, 735 F.2d 15, 21 (2d Cir. 1984).

b. The disclosure document is read as a whole.

In evaluating the adequacy of disclosure, the document is read as a whole. *See, e.g., Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1307 n.7 (9th Cir. 1982) (treatment of promotional and developmental costs was "adequately explained in the footnotes to the financial statements if viewed in conjunction with the balance sheet"); *Associated Builders*, 505 F.2d at 99-100.

c. The standard for adequacy of disclosure is not perfection.

The disclosure is measured not against a standard of perfection—whether the disclosure is written in the best way—but whether the disclosure is adequate:

> We do not intimate that appellant's critique of [the disclosure] is entirely unfounded. To be sure, the quality of disclosure could have been improved. But the advisability of revision does not render what was done deceptive or misleading. The question is whether the

> prospectus, as written, adequately apprises the reader of the essential nature of a material facet of the issuer's financial condition. The fair and intelligible definition . . . set forth [in the prospectus] satisfies this basic requirement. . . .

Greenapple v. Detroit Edison Co., 618 F.2d 198, 211 (2d Cir. 1980).

d. The reasonable investor standard is objective.

As indicated above, the standard is an objective one. The issue is whether the document makes adequate disclosure, not whether some investors or analysts might have misread it. *Lucas*, 765 F.2d at 1042, 1046 (misreading by investment community and analysts of redemption provisions did not prevent dismissal of claims where there was adequate disclosure in prospectus); *Associated Builders*, 505 F.2d at 99-100 (language of prospectus as whole rebutted subjective understanding). This rule strongly supports summary disposition where the alleged misstatement is based on a written document.

2. The Ninth Circuit's Application of a Subjective Standard Is In Conflict With the Decisions of Other Circuits and of the Law As It Should Be Settled By This Court.

Based on this body of precedent, the standard of whether there is a substantial likelihood that a reasonable investor in the market who read the offering document as a whole would be misled sets a rigorous burden for pleading a securities fraud claim. The Ninth Circuit's subjective test of whether an investor "might" be misled, without regard to the market and in disregard of the terms of the disclosure, guts this standard in precisely a way rejected by this Court and other circuits.

Associated Builders demonstrates a proper application of the objective standard to a securities fraud claim. There,

a mandatory redemption provision was alleged to have been inadequately disclosed. The provision was in fact incompletely disclosed on the first page of the prospectus, but was fully disclosed in two other sections of the prospectus. Assuming that it was "reasonable [for the issuer] to assume that investors who [purchase] their bonds would familiarize themselves with conditions under which they were issued, and particularly the terms of redemption . . . ." and reviewing the language "in light of the circumstance in which it was made," the Fifth Circuit held the disclosure adequate. 505 F.2d at 101. It concluded that "[o]nly by the most cursory reading of the prospectus could the investor have been unaware of [the] full description of the redemption features of the bonds," *id.*, and dismissed the case.

In this case, after a meticulous and well-articulated analysis of the pertinent information on mandatory redemption, the district court found the document to be unambiguous and dismissed the complaint. 627 F. Supp. at 396, App. C at 9. In so doing, it considered all of the terms of the Official Statement, as well as the practical operation of a housing revenue bond program. *Id.* Although it considered plaintiffs' allegations of market confusion, it rejected such confusion as a basis for relief because the language of the Official Statement disclosed the mandatory redemption provision.[24] *Id.* at 397, App. C at 13-14. It did not require perfection, but simply inquired whether the disclosure was made. *Id.* at 396, App. C at 13.

The Ninth Circuit's analysis was quite different, and at odds with the test which should be adopted for the adequacy of disclosure. It stated its conclusion that "a reasonable

[24] The district court also noted that the Official Statement expressly warned investors to not rely on third party representations. 627 F. Supp. at 397, App. C at 14. The warning is set forth in App. E at 8.

investor *might* fail to understand that the bonds are redeemable under [the mandatory redemption] section whenever funds in the ["Mandatory Redemption"] Account are sufficient." 815 F.2d at 1269, App. A at 20. It reached this conclusion based on an analysis of possible subjective interpretations of the language of the Official Statement. Noting the dates and schedules for optional and sinking fund redemption, it observed that, "[b]y contrast, there are no specific redemption dates in the subdivision entitled 'Mandatory Redemption at Par' and no tables." *Id.*, App. A at 20.

At this point, however, the court's reasoning became less meticulous and more subjective. Based on the absence of calendar dates and tables in the mandatory redemption section, it made the unreasonable assumption that an investor might look to other sections for some calendar dates, and seize upon the 1991 date set forth for optional redemptions.[25] The court does not state why a reasonable investor might do this, or how the language supports this interpretation. When faced with the Official Statement's warning that the prepayment rate was difficult to predict, and prepayments were *required* to be applied to mandatory redemption (App. E at 6-7), the Ninth Circuit simply stated that this did "*not necessarily* alert the investor that such redemption can occur prior to 1991." 815 F.2d at 1269, App. A at 21 (emphasis added).

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[25] If an investor were to seize any date before which mandatory redemption could not occur, it would logically be the May 1, 1983 date upon which unexpended proceeds were required to be applied to mandatory redemption. This date at least appears in the mandatory redemption section. We note that, under the Durnings' position that they had protection from mandatory redemption until 1991, the Authority would have been required to hold over one-third of the Bond proceeds for eight years beyond the date on which the funds were transferred to the Mandatory Redemption Account. There is no basis for such an interpretation in the language of the Official Statement, and such a reading is unreasonable in the context of this program.

The Ninth Circuit's analysis violates each of the rules which have been established to ensure objective standards of disclosure. Most importantly, the Ninth Circuit has used the "might" test specifically rejected in *TSC Industries*. It failed to consider that a reasonably informed investor in housing bonds should know that mandatory redemption provisions are common and necessary for the integrity of the program, facts which were repeatedly disclosed in the Official Statement. No time limitations were stated on mandatory redemption, and investors were warned that the level of prepayments—one of the sources of mandatory redemption—could not be predicted. The only reasonable inference to be drawn from the fact of time limitations on optional and sinking fund redemptions, and none on mandatory redemption, is that there were no time limits on mandatory redemption.

The subjective rule adopted by the court of appeals will promote the very sort of strike suits against which this Court cautioned in *Blue Chip Stamps*, 421 U.S. at 739-41. *Lucas v. Florida Power & Light Co.*, 765 F.2d 1039 (11th Cir. 1985), illustrates well the expensive consequences where adequacy of a written disclosure cannot be tested on a motion to dismiss. There, after six years of discovery and eight days of trial, the district court dismissed claims that a private utility had failed to adequately advise investors of redemption provisions. On appeal, the Eleventh Circuit held, based on the face of the final prospectus, that the redemption provisions had been adequately disclosed: The " 'plain language contained in the prospectuses clearly indicated the reserved right to [redeem]' " and the " 'description of the [redemption] fund was sufficient, adequate and unambiguous.' " 765 F.2d at 1043 (quoting district court's findings).[26] Without summary disposition,

[26] *Lucas* is noteworthy in two other respects. First, the redemption provision at issue there did not include the words "at any time" which plaintiffs here suggest is necessary for an adequate dis-

(footnote continued on next page)

the *Lucas* defendants were required to endure the risk, expense and burden of discovery, trial, and appeal, only to prevail on a standard that easily could have been met on pretrial motion.

Furthermore, contrary to the intent of *TSC Industries* and *Blue Chip Stamps*, a subjective rule gives those involved in marketing securities the incentive to bury investors in trivia and minutiae. This will make for less effective disclosure in documents which plaintiffs already complain are too complex and arcane.[27]

Under the standard employed by the Ninth Circuit in this case, municipal issuers will *never* be entitled to summary disposition such as was granted in *Associated Builders* and instead will be relegated to enduring the *Lucas* experience. If, however, a court were permitted to review plaintiffs' allegations and draw reasonable inferences supported by the objective reality of the single-family mortgage revenue bond market and the clear language of the Official Statement, plaintiffs' far-fetched reading could be dismissed as such.

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closure. 765 F.2d at 1041. Third, in applying the reasonable investor standard, the court focused on the language of the disclosure, *id.* at 1043-44, and not the subjective reactions to it. That securities analysts and media had misread (or failed to read) the disclosure did not render it inadequate. *Id.* at 1046. Plaintiffs here have made similar allegations of confusion.

[27] Plaintiffs have already in this case noted that:

> Official Statements are perhaps second only to indentures themselves, for sheer impenetrability. Few writings are as obtuse as an official statement for a public authority's housing bonds. These documents are probably not understood in totality by anyone other than bond counsel and similar arcane professionals.

Plaintiffs' Memorandum in Opposition to Motion to Dismiss, at 6.

C. The Ninth Circuit's Application of Rule 12(b)(6) Renders Meaningless the Unambiguous Words of the Official Statement and Vitiates the Substantive Rules Concerning Disclosure.

Substantive rules concerning the level of disclosure are left meaningless if the courts are not empowered to dismiss claims based solely on fair, intelligible, and adequate written disclosures. The Ninth Circuit's application of Federal Rule of Civil Procedure 12(b)(6)[28] imposes on the issuer the impossible burden of assuming that an investor will either ignore written disclosures or just misread them. This application is contrary to the standard used throughout the circuits.

While the black letter rule is that a motion under Rule 12(b)(6) may be granted only if it appears that no set of facts would entitle the pleader to relief, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this rule is in practice subject to considerable limitations. This Court has recognized the value of summary dispositions in complex cases, formulating strict rules concerning burdens and permissible inferences. *Matsushita Electrical Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *see Blue Chip Stamps*, 421 U.S. at 739-41 (dismissing case, limiting standing in Rule 10b-5 cases to reduce exposure to strike suits). As those cases make clear, rigorous application of summary disposition is particularly appropriate where, as here, the application of the procedural rules affects the substantive conduct of the parties. Furthermore, Rule 12(b)(6), properly applied, does not grant all inferences to a plaintiff, but only *reasonable* ones:

> A motion to dismiss for failure to state a cause of action can serve a useful purpose in disposing of legal issues with a minimum of time and expense to the interested parties

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[28] Under Fed. R. Civ. P. 12(b)(6), a claim may be dismissed where it fails to state a claim upon which relief may be granted.

> and is applicable to an anti-trust complaint. In testing the legal sufficiency of the complaint the well-pleaded allegations are taken as admitted but conclusions of law and *unreasonable inferences or unwarranted deductions of fact are not admitted.*

Hiland Dairy, Inc. v. Kroger, 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969) (emphasis added). When a plaintiff attaches a document to the complaint, the terms of the document control the facts assumed and inferences drawn. *See, e.g., Associated Builders*, 505 F.2d at 100 (dismissal of claims asserting nondisclosure of possibility of redemption); *Spiegler v. Wills*, 60 F.R.D. 681, 683 (S.D.N.Y. 1973) (dismissal where attachment disclosed facts allegedly concealed).

The Ninth Circuit's approach undercuts the effect of the disclosure within the Official Statement. Although the court acknowledged that the right of mandatory redemption was disclosed, and that no time limits were stated on that right, it held on a motion to dismiss that plaintiffs were entitled to the inference that a reasonable investor *might* refer to a date from the optional redemption section, separated by an italicized heading, and apply it to the mandatory redemption section. By some twist of reasoning, this may be an inference; however, given the disclosure and the nature of the investment, it is not a *reasonable* inference.

This analysis is contrary to that applied in the other circuits. It will have no effect other than to needlessly prolong or promote litigation concerning language plain on its face. Where a document is attached to the complaint, its terms, fairly and objectively read, must control the inferences drawn. Such a rule can provide reasonable protection against suits without a reasonable basis.

CONCLUSION

The Ninth Circuit applied a test fundamentally at odds with the decisions of other circuits and relevant principles established by this Court when it reversed the district court decision by holding that a municipal issuer must assume that a reasonable investor might misread unambiguous offering documents. Not only does this do violence to the substantive securities laws, both by making adequate disclosure unattainable and by encouraging potential issuers to set forth an avalanche of detail, it also procedurally subjects issuers to extensive litigation over words which are before the court and are clear. If the disclosure is clear on its face, the claim should be dismissed.

The petitioners respectfully request that their petition for writ of certiorari be granted.

DATED this 21st day of September, 1987.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARVIN B. DURNING and JEAN C. DURNING, husband and wife, on behalf of themselves and all persons similarly situated,	)	No. 86-3544
Plaintiffs-Appellants,	)	D.C. No. CV-85-1328-D
v.	)	OPINION
THE FIRST BOSTON CORPORATION; CITIBANK, N.A.; FIRST INTERSTATE BANK OF CASPER, N.A.; WYOMING COMMUNITY DEVELOPMENT AUTHORITY,	)	
Defendants-Appellees.	)	

Argued and Submitted
November 12, 1986
San Francisco, California

Filed April 27, 1987

Before: Thomas Tang, Mary M. Schroeder and William A. Norris, Circuit Judges.

Opinion by Judge Tang

Appeal from the United States
District Court for the
Western District of Washington
Carolyn R. Dimmick,
District Judge, Presiding

SUMMARY

Securities

Appeal from dismissal of action.
Reversed and remanded.

This action arises from a dispute over whether appelllees [sic], in connection with a bond issue, distributed an Official Statement that failed to inform investors that the bonds were redeemable prior to 1991. Appellants, the Durnings, filed an action alleging violations of federal and state securities laws, common law negligent misrepresentation, breach of contract, tortious breach of the covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, and violation of the Racketeer Influenced and Corrupt Organizations Act. The district court ruled that when, as here, the allegations of the complaint are refuted by an attached document, the Court need not accept the allegations as being true. The court held as a matter of law that the Official Statement was not

ambiguous and informs the investors that the bonds were redeemable prior to 1991.

[1] If a complaint is accompanied by attached documents, they are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim. [2] A corporation has no right to recall its bonds prior to maturity except as provided by the bonds themselves. [3] To determine whether the Official Statement was misleading, this court looks to see whether an investor who had been reasonably diligent in reviewing the Official Statement would have been misled as to the callability of the bonds (the reasonable investor test). [4] In this case, a jury could conclude that a reasonable investor might fail to understand that the bonds are redeemable whenever funds in the

Mandatory Redemption Account are sufficient.

COUNSEL

Dexter A. Washburn, Seattle, Washington, for the plaintiffs-appellants.

Paul L. Ahern, Jr., Seattle, Washington, for the defendants-appellees.

OPINION

TANG, Circuit Judge:

The Durnings appeal the district court's dismissal of their securities fraud action for failure to state a claim upon which relief can be granted.

The Durnings brought suit in United States District Court for the District of Washington pursuant to the jurisdictional provisions of the Securities Act of 1933, 15 U.S.C. § 77v, and the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and under diversity jurisdiction pursuant to 28 U.S.C. § 1332.

The Durnings allege violations of federal and state securities laws, common law negligent misrepresentation, breach of contract, tortious breach of the covenant of good faith and fair dealing, breach of fiduciary duty, unjust enrichment, and violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68. The gravamen of their complaint is that the defendants, in connection with a bond issue, distributed an Official Statement, a disclosure document equivalent to a prospectus, that failed to inform investors that the bonds were redeemable prior to 1991. The Durnings attached several documents to the complaint, including a copy of the Official Statement, a description of the bonds by Moody's Investor's Service stating that the bonds were not callable before

June 1, 1991, and a confirmation statement from Shearson/American Express describing the bonds as callable on June 1, 1991.

All four defendants moved to dismiss under Fed. R. Civ. P. 12(b)(6) arguing that the Official Statement refutes the Durnings' allegations. The court ruled that "[w]hen the allegations of the complaint are refuted by an attached document, the Court need not accept the allegations as being true." Durning v. First Boston Corp., 627 F. Supp. 393, 395 (W.D. Wash. 1986). The court held, as a matter of law, that the Official Statement is not ambiguous and informs the investors that the bonds were redeemable prior to June 1, 1991. Id. at 397.

Because we find that the complaint alleges sufficient facts to state a

claim which are not, as a matter of law, refuted by the Official Statement, we reverse.

FACTS

This lawsuit arises out of a $75,000,000 issue of tax exempt single family mortgage revenue bonds by the Wyoming Community Development Authority ("Authority"). First Interstate Bank of Casper is the trustee for the bond issue. Citibank is the paying agent. First Boston Corporation is the lead underwriter for the syndicate which marketed the bonds.

The Authority was created to provide financing for housing construction in Wyoming. The Authority used the bond proceeds to purchase mortgage loans on residential real property from financial institutions and made those loans available to home buyers at low interest

rates. In December of 1981, the Authority sold the bonds to the underwriters, led by First Boston, for distribution to the public. The Durnings purchased four bonds from the first of two series issued. Each bond had a face value of $5,000 and a maturity date of June 1, 1996.

The Authority recalled $28,000,000 of bonds in June 1983 and another $4,000,000 in June 1985. One of Durnings' bonds was recalled in 1985. The Durnings allege that this resulted in the loss of $4,000 in interest payments and caused the value of their remaining three bonds to diminish in the secondary trading market.

DISCUSSION

[1] We review de novo a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Fort

Vancouver Plywood Co. v. United States, 747 F.2d 547, 552 (9th Cir. 1984). A complaint should not be dismissed under the rule "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also, Amfac Mortgage Corp. v. Arizona Mall of Tempe, Inc., 583 F.2d 426, 429-30 (9th Cir. 1978). All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985), cert. denied, 106 S. Ct. 795 (1986). If a complaint is accompanied by attached documents, the court is not limited by the allegations contained in the complaint. Amfac Mortgage Corp., 583 F.2d at 429. These

documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim. Id. at 429-30.

Section 17(a)(2) of the Securities Act of 1933[1] and Securities and

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1. 15 U.S.C. § 77q.

> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly
>
> * * * *
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . ."

Exchange Commission Rule 10b-5[2] promulgated under Section 10 of the Securities Exchange Act of 1934[3] make it unlawful for any person to fail to state a material fact in connection with an offer for the sale of securities. These laws insure disclosures by the sellers of securities so purchasers can make informed choices. Cf. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 448 (1975)(discussing Rule

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2. 17 C.F.R. § 240.10b-5.

"It shall be unlawful for any person, directly or indirectly, . . .

* * * *

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . . .

3. 15 U.S.C. § 78j.

14a-9 which prohibits false or misleading statements in proxy statements).

[2] A corporation has no right to recall its bonds prior to maturity except as provided by the bonds themselves. W. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations, § 2731 (H. Schlagman, revised edition, 1981). The creation of a sinking fund alone does not give the issuer a right to redeem early. Id. (citing Chicago and I.R. Co. v. Pyne, 30 F. 86 (C.C. S.D.N.Y. 1887)).

[3] The complaint alleges that the Official Statement failed to disclose a material fact: that the bonds were callable prior to June 1, 1991. The parties agree that callability of a bond is a material fact. The dispute, however, centers on whether the Official

Statement adequately disclosed the fact of callability. To determine whether the Official Statement was misleading, we apply the "reasonable investor" test: whether an investor who had been reasonably diligent in reviewing the Official Statement would have been mislead [sic] as to the callability of the Bonds. See Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1306 (9th Cir. 1982).[4/] This is an objective test. Id.

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4. In Admiralty Fund, we expanded the "reasonable investor" standard for determining whether a fact is material to cover the issue of adequacy of disclosure. The test for determining whether or not a fact is material is whether "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." TSC Industries, 426 U.S. at 449. We applied that test in Admiralty Fund, albeit without explanation, to evaluate whether a prospectus was misleading as a matter of law. The application of the reasonable

Whether an Official Statement adequately discloses callability is a mixed question of law and fact. Cf. TSC Industries, 426 U.S. at 450. "The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." Id. Only if the disclosure is so obvious that reasonable minds cannot differ is the issue appropriately resolved as a matter of law. Id. Like materiality, adequacy of disclosure is normally a jury

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4. (Continued) investor test is appropriate because adequacy of disclosure, like materiality, only can be judged against an objective standard of investor behavior.

question. Admiralty Fund, 677 F.2d at 1306.

The district court cited three sections of the Official Statement in support of the dismissal. The first is a sentence on page one which reads: "The Bonds will be subject to redemption prior to maturity as more fully set forth herein, including mandatory redemption at par from unexpended proceeds, prepayments and certain revenues." The second section the court cited explained three means of redemption: (1) Sinking Fund Redemption, (2) Mandatory Redemption at Par, and (3) Optional Redemption. The Sinking Fund Redemption and Optional Redemption provisions clearly state certain dates prior to maturity on which the bonds can be called. The earliest of these dates is June 1, 1991, five

years prior to maturity. The Mandatory Redemption at Par section provides:

> The Bonds will be subject to mandatory redemption at a redemption price equal to 100% of the principal amount of the Bonds to be redeemed, plus interest accrued to the redemption date, from amounts on deposit in the Mandatory Redemption Account representing (i) Bond proceeds deposited from the Program Fund and remaining unexpended on May 1, 1983, (ii) Prepayments of Mortgage Loans, (iii) amounts withdrawn from the Bond Reserve Fund as the result of the reduction of the Bond Reserve Requirement and (iv) excess revenues, subject to the Authority's right, under certain conditions, to withdraw from the lien of the Indenture investment earnings on amounts on deposit in the Special Reserve Fund.

The third section that the district court discussed appears on page 16 of the Official Statement:

> Due to the many factors which influence economic and financial market conditions, the Authority is not able to predict with any significant

> degree of reliability the expected level of prepayments it will actually receive on the Mortgage Loans. To the extent that prepayments occur, the Authority is required by the Indenture to apply amounts received to the redemption of Bonds.

The district court concluded that "these three sections, taken together, unambiguously inform the investor that mandatory redemption may take place at any time the mandatory redemption account has sufficient funds." 627 F. Supp. at 396.

The Durnings vigorously maintain that no reasonable investor could decipher from reading the Official Statement that the bonds were callable prior to the earliest date listed in the tables of the redemption section, June 1, 1991. They offer the Moody's rating and the Shearson/American Express confirmation statement in support of

their contention. Although the statement on the first page alerts the investor that the bonds can be redeemed prior to maturity, the details are set forth within the document. The redemption provisions are described on pages 13 and 14 of the 44-page document in a section entitled "The Bonds." The first sentence of the Sinking Fund Redemption provision says "The Bonds due June 1, 1996 will be subject to mandatory redemption prior to maturity, in part by lot on any June 1, on and after June 1, 1994 . . . ." A table following the paragraph shows the principal amount of the bonds to be redeemed in 1994 and 1995. The first sentence of the Optional Redemption provision states that "the Bonds will be subject to redemption, at the option of the Authority on any interest payment

date on and after June 1, 1991 . . . ." A table following the paragraph lists six redemption periods beginning June 1, 1991 and ending June 1, 1996 with the optional redemption prices available during those periods.

[4] By contrast, there are no specific redemption dates in the subdivision entitled "Mandatory Redemption at Par" and no tables. Instead, the text describes a "Mandatory Redemption Account." A jury could conclude that a reasonable investor might fail to understand that the bonds are redeemable under this section whenever funds in the Account are sufficient. The warning on page 16 that the Authority is not able to predict when it will actually receive prepayments of the mortgage loans may alert the investor that the time of

redemption is uncertain, however, it does not necessarily alert the investor that such redemption can occur prior to 1991.

In reaching its decision, the district court relied on Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97 (5th Cir. 1974). In that case the Alabama Power Company had issued bonds that Associated Builders had bought on the secondary market. Based upon the prospectus, Associated Builders believed that the bonds were absolutely protected against call until November 1, 1975. In 1973, Alabama Power sought to redeem several of these bonds and Associated Builders filed suit against Alabama Power for damages under federal securities laws. The court, noting that 12(b)(6) motions are disfavored, nevertheless granted Alabama's motion to

dismiss. The court concluded that "the prospectus adequately disclosed the redemption provisions of the bonds."

Associated Builders is distinguishable from this case. The central issue in both cases, whether the Statements adequately informed the investor of callability, is a fact specific inquiry, and the prospectus in Associated Builders differs significantly from the Official Statement at issue in this case. In Associated Builders, portions of the prospectus expressly notified the investor that the bonds were callable "at any time on 30 days' notice." There were no allegations of confusion on the part of experts comparable to the Moody's rating and Shearson American Express confirmation statements plaintiffs submitted in this case. The

case at bar is not a case where the issue of adequate disclosure could be determined by a trial court as a matter of law.

In reviewing the complaint and the Official Statement, we cannot conclude, as did the district court, that "reasonable minds cannot differ." TSC Industries, 426 U.S. at 450, as to whether a reasonable investor in reading this Official Statement would conclude that the bonds were callable prior to June 1, 1991. We hold that the Durnings have stated a claim under federal securities laws[5] and that the trial court erred in deciding that the

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5. Because the Durnings have stated a claim for relief under federal securities laws, we need not consider their other federal and state law allegations.

Official Statement was unambiguous as a matter of law.

Accordingly, the judgment of the district court is REVERSED and REMANDED.

2296w

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARVIN B. DURNING and JEAN C. DURNING, husband and wife, on behalf of themselves and all persons similarly situated,	)	
Appellants,	)	No. C85-1328D
v.	)	
THE FIRST BOSTON CORPORATION; CITIBANK, N.A.; FIRST INTERSTATE BANK OF CASPER, N.A.; WYOMING COMMUNITY DEVELOPMENT AUTHORITY,	)	ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
Appellees.	)	

Before: TANG, SCHROEDER and NORRIS, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing

and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

2312w

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARVIN B. DURNING and JEAN C. DURNING, husband and wife, on behalf of themselves and all other persons similarly situated, Plaintiffs, v. THE FIRST BOSTON CORPORATION; CITIBANK, N.A.; FIRST INTERSTATE BANK OF CASPER, N.A.; WYOMING COMMUNITY DEVELOPMENT AUTHORITY, Defendants.	No. C85-1328D MEMORANDUM AND ORDER

Defendants move to dismiss under Fed. R. Civ. P. 12(b)(6). They argue that a document attached to the complaint shows that plaintiffs have failed to state a claim upon which relief can be granted. The Court agrees and

accordingly dismisses this cause of action.[1]

This securities fraud lawsuit arises out of the sale of a $75,000,000 issue of tax-exempt single family mortgage revenue bonds by the Wyoming Community Development Authority ("Authority"). First Interstate Bank of Casper is the trustee for the bond issue. Citibank is the paying agent. First Boston Corporation is the lead underwriter for the syndicate which marketed the bonds.

The Authority was created to provide financing for the construction of housing. In 1978, the Authority initiated the single family mortgage purchase program to enable many otherwise ineligible borrowers to obtain mortgage loan

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1. Because of the Court's ruling on the 12(b)(6) motion, all other motions pending in this case are moot.

financing. The 1981 bond issue was part of that program.

The Authority was authorized to use the bond proceeds to purchase certain qualifying mortgage loans on residential real property from financial institutions. The home purchasers paid an interest rate of 13 percent for 20-year mortgages. The Authority used the homeowners' monthly mortgage payments to make interest payments to its bondholders.

In 1981, plaintiffs Marvin and Jean Durning purchased four bonds in the principal amount of $5,000 each. The bonds were offered and sold to the public pursuant to a disclosure document known as the Official Statement. Plaintiffs allege that the Official Statement was misleading because it did not inform investors that the bonds were redeemable

prior to 1991. In June 1985, one of the Durnings' bonds was recalled for redemption. The Durnings allege that this resulted in the termination of interest payments of more than $4,000 through 1991. The Durnings also allege that the value of the bonds in the secondary trading market dropped immediately after the June 1985 call from 119.74 to 104.00 (100 = par).

The Durnings brought this action against the four named defendants. The Durnings moved to have this action certified as a class action on behalf of those who purchased bonds prior to the 1985 call. The Durnings assert claims under federal and state securities laws, common-law negligent misrepresentation, breach of contract, tortious breach of the covenant of good faith and fair dealing, breach of fiduciary duty,

unjust enrichment, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961. All four defendants move to dismiss under Fed. R. Civ. P. 12(b)(6).

A motion to dismiss will not be granted unless it appears to a certainty that the plaintiff would not be entitled to relief under any facts that could be proved. Halet v. Wend Investment Co., 672 F.2d 1305 (9th Cir. 1982). A plaintiff's complaint will be liberally construed in his favor with the alleged facts generally accepted as true. Rosen v. Walters, 719 F.2d 1422 (9th Cir. 1983).

Plaintiffs' complaint alleges that they were mislead [sic] when buying the bonds because the Official Statement did not disclose that the bonds were redeemable before June 1, 1991. Accepting

this factual assertion as being true, plaintiffs have a valid claim against the defendants.

The defendants, however, contend that plaintiffs' allegations are refuted by the Official Statement which is attached to the complaint. When the allegations of the complaint are refuted by an attached document, the Court need not accept the allegations as being true. See Ott v. Home Savings & Loan Ass'n, 265 F.2d 643, 646 n.1 (9th Cir. 1958); Interstate Natural Gas Co. v. Southern California Gas Co., 209 F.2d 380, 384 (9th Cir. 1953). See also 5 C. Wright & A. Miller § 1357, nos. 84-86 (1969) and accompanying text. Thus, if the Court finds that the Official Statement explains that the bonds were recallable at any time after their

issuance, then this cause of action must be dismissed.[2]

On the first page of the Official Statement, in the first paragraph, a sentence reads:

> The Bonds will be subject to redemption prior to maturity as more fully set forth herein, including mandatory redemption at par from unexpended proceeds, prepayments and certain revenues.

This sentence immediately puts the investors on notice that the bonds are subject to redemption -- including mandatory redemption.

On pages 13-14 of the Official Statement, the investor is informed of

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2. At oral argument counsel for defendants informed the Court that the Authority recalled $28 million worth of bonds in 1983 -- seven times the amount recalled in 1985. No litigation arose out of that redemption and no other litigation has been instituted involving the 1985 redemption.

three types of redemption: (1) sinking fund redemption, (2) mandatory redemption at par, and (3) optional redemption. The sinking fund and optional redemption provisions clearly set forth when the bonds can be redeemed. There is no dispute concerning these types of redemptions. Instead, the dispute involves the mandatory redemption at par provision which provides:

> The Bonds will be subject to mandatory redemption at a redemption price equal to 100% of the principal amount of the Bonds to be redeemed, plus interest accrued to the redemption date, from amounts on deposit in the Mandatory Redemption Account representing (i) Bond proceeds deposited in the Program Fund and remaining unexpended on May 1, 1983, (ii) Prepayments of Mortgage Loans, (iii) amounts withdrawn from the Bond Reserve Fund as the result of the reduction of the Bond Reserve Requirement and (iv) excess revenues, subject to the Authority's right, under certain conditions, to withdraw from the lien of the Indenture

> investment earnings on amounts on deposit in the Special Reserve Fund.

On page 16, the Official Statement warns investors that the Authority is unable to predict when redemption would occur:

> Due to the many factors which influence economic and financial market conditions, the Authority is not able to predict with any significant degree of reliability the expected level of prepayments it will actually receive on the Mortgage Loans. To the extent that prepayments occur, the Authority is required by the Indenture to apply amounts received to the redemption of Bonds.

These three sections, taken together, unambiguously inform the investor that mandatory redemption may take place any time the mandatory redemption account has sufficient funds.[3/]

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3. When the mandatory redemption account will have sufficient funds is impossible to predict because when the bonds are issued, the Authority cannot

An analagous [sic] case is Associated Builders, Inc. v. Alabama Power Co., 505 F.2d 97 (5th Cir. 1974). There, the plaintiff filed a class action suit alleging that a prospectus

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3. (Continued) predict the amount of bond proceeds that will be used to purchase mortgages. The demand for the proceeds depends upon the demand for mortgages, which in turn depends upon the demand for single family housing. Moreover, mortgage interest rates fluctuate. Should mortgage interest rates fall below the 13-percent rate required to be charged pursuant to the bond issue to secure the issue's creditworthiness, at least two consequences are likely to occur: (1) homebuyers are likely to seek mortgage financing from other sources because they can obtain a mortgage elsewhere at a lower rate, and (2) homeowners will prepay and refinance the mortgages backed by the Authority.

If this occurs, the Authority must have the ability to reduce the number of outstanding bonds because it will not be able to generate sufficient funds from remaining mortgage payments to meet debt service obligations. The right to redeem the bonds under these circumstances makes the program economically sound and default less likely.

misrepresented the fact that the bonds it had purchased were recallable. Plaintiff had appended a copy of the prospectus to the complaint. The court upheld the trial court's decision granting defendant's motion to dismiss under Rule 12(b)(6). The court found the prospectus, taken as a whole, showed that the bonds could be redeemed at any time.

The Durnings argue that Associated Builders is inapposite because the prospectus in that case used the phrase "at any time" in describing when the bonds could be recalled. The Durnings assert that while the Authority has used the phrase "at any time" in previous and subsequent offerings, the phrase was not used in this offering. The Durnings have also presented to this Court, as an attachment to their brief, a xeroxed

copy of part of Moody's Municipal & Government Manual. Moody's, in describing the 1981 series A bonds, states that the bond [sic] were not callable before June 1, 1991. These two contentions pose a problem. Generally, a court will only consider the complaint and any attached exhibits when deciding a 12(b)(6) motion. See 5 C. Wright & A [sic] Miller, Federal Practice & Procedure §§ 1356, 1357 (1969). Thus, the Court normally would not consider this information. However, in view of the fact that a motion to dismiss for failure to state a claim should only be granted when defendant can show that under no set of facts can plaintiff prevail, the Court will consider this information.

First, the Authority's use of the phrase "at any time" in previous bond

issues is irrelevant. Whether the Official Statement could have been written in a clearer, more explicit, fashion is not for this Court to decide. The only relevant issue before this Court is, looking only at the Official Statement, whether it informs the investor that the bonds were redeemable at any time. For the reasons stated earlier, the Court finds that the Official Statement so informs the investor.

Second, Moody's interpretation of the Official Statement is irrelevant. Because the Official Statement is clear on its face that the bonds were redeemable at any time that mandatory redemption funds were sufficient, it is irrelevant that Moody's misinterpreted

the Official Statement.[4] Moreover, the Official Statement itself, on the table of contents' page, states that

> [n]o dealer, broker, salesman or other person has been authorized by the Wyoming Community Development Authority or the underwriters to give any information or to make any representations, other than as contained in this Official Statement. If given or made, such other information or representations must not be relied upon as having been authorized by any of the foregoing.

Thus, investors were warned that third-party representations concerning the bond issue may not be accurate.

Because the Court finds, as a matter of law, that the Official Statement is

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4. It is interesting to note that Moody's made another mistake in describing the 1981 Series A bond offering. It states that, beginning in 1982, the bonds could be recalled at 102-1/2. The Official Statement is clear, however, that under the mandatory redemption provision, the bonds would be redeemed at par value (par = 100).

not ambiguous and that it informs investors that the bonds were redeemable when the mandatory redemption account has sufficient funds, the plaintiffs have failed to state a claim for which relief can be granted.

THEREFORE, this cause of action is DISMISSED.

The Clerk of the Court is instructed to send a copy of this Memorandum and Order to all counsel of record.

DATED this 7th day of January, 1986.

/s/
CAROLYN R. DIMMICK
United States
District Judge

2295w

APPENDIX D

15 U.S.C. § 78j.

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange -

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities

exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

17 C.F.R. § 240.10b-5

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

D - 4

Federal Rule of Civil Procedure

12(b)(6)

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

18 U.S.C. § 1964.

Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent

persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit,

including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

APPENDIX E

OFFICIAL STATEMENT

$75,000,000

Wyoming Community Development Authority
Single Family Mortgage Revenue Bonds
1981 Series A

Dated December 1, 1981
Due June 1, as shown below

The Bonds will be issuable as coupon Bonds, registrable as to principal only, in the denomination of $5,000 each, and as fully registered Bonds without coupons in denominations of $5,000 or any integral multiple thereof. Interest on the Bonds is payable semi-annually on June 1 and December 1, with the first payment on June 1, 1982. Coupon Bonds will be payable at the principal office of First Interstate Bank of Casper, N.A., Casper, Wyoming, Trustee and Paying Agent, or at the corporate trust office of Citibank, N.A., New York, New York, Paying Agent. The Bonds will be subject to redemption prior to maturity

as more fully set forth herein, including mandatory redemption at par from unexpended proceeds, prepayments and certain revenues.

Neither the faith and credit nor taxing power of the State of Wyoming or any political subdivision thereof is pledged to the payment of the Bonds. The State of Wyoming is not liable on the Bonds and the Bonds are not a debt of the State. The Authority has no taxing power.

. . . .

Redemption

Sinking Fund Redemption. The Bonds due June 1, 1996, will be subject to mandatory redemption prior to maturity, in part by lot on any June 1 on and after June 1, 1994, at a redemption price equal to 100% of the principal amount thereof plus interest accrued to the redemption date, from sinking fund installments which are required to be paid in amounts sufficient to redeem on June 1 of each year the principal amount of such Bonds specified for each of the years shown below:

Year	Amount
1994	$3,060,000
1995	3,480,000

Based upon the foregoing redemption schedule, there will remain $3,960,000 principal amount of Bonds due June 1, 1996 to be paid at maturity.

. . . .

Mandatory Redemption at Par. The Bonds will be subject to mandatory redemption at a redemption price equal to 100% of the principal amount of the Bonds to be redeemed, plus interest accrued to the redemption date, from amounts on deposit in the Mandatory Redemption Account representing (i) Bond proceeds deposited in the Program Fund and remaining unexpended on May 1, 1983, (ii) Prepayments of Mortgage Loans, (iii) amounts withdrawn from the Bond Reserve Fund as the result of the reduction of the Bond Reserve Requirement and (iv) excess revenues, subject to the Authority's right, under certain conditions, to withdraw from the lien of the Indenture investment earnings on amounts on deposit in the Special Reserve Fund. See SUMMARY OF CERTAIN PROVISIONS OF THE INDENTURE.

Optional Redemption. The Bonds will be subject to redemption, at the option of the Authority, on any interest payment date on and after June 1, 1991, either as a whole or in part (and by lot if less than all of a maturity is to be redeemed), at the optional redemption prices, expressed as percentages of the principal amount set forth below, plus interest accrued to the redemption date:

Redemption Period (Both Dates Inclusive)	Optional Redemption Price
June 1, 1991 to May 31, 1992	102 1/2%
June 1, 1992 to May 31, 1993	102
June 1, 1993 to May 31, 1994	101 1/2
June 1, 1994 to May 31, 1995	101
June 1, 1995 to May 31, 1996	100 1/2
June 1, 1996 and thereafter	100

REVENUE AND DEBT SERVICE ASSUMPTIONS

. . . .

In establishing the maturities and sinking fund installments for the Bonds, the Authority assumed that there would be no prepayments of Mortgage Loans purchased with the proceeds of the Bonds. Prepayments in full usually result from the sale of the premises securing a mortgage loan or the refinancing of the loan due to changes in mortgage interest rates, and it is generally believed that economic and financial market conditions have an effect on the rate of mortgage loan prepayments. In the Authority's experience to date, actual prepayments have been significantly less than Federal Housing Administration (the "FHA") experience in Wyoming. Due to the many factors which influence economic and financial market

conditions, the Authority is not able to predict with any significant degree of reliability the expected level of prepayments it will actually receive on the Mortgage Loans. To the extent that prepayments occur, the Authority is required by the Indenture to apply amounts received to the redemption of Bonds . . . .

. . . .

No dealer, broker, salesman or other person has been authorized by the Wyoming Community Development Authority or the Underwriters to give any information or to make any representations, other than as contained in this Official Statement. If given or made, such other information or representations must not be relied upon as having been authorized by any of the foregoing.

. . . .

APPENDIX F

Rule 28.1 List

First Interstate Bank of Casper, N.A., is wholly owned by First Interstate Bancorp and is affiliated with First Interstate Bank of Arizona, N.A., First Interstate Bancard Company, N.A., First Interstate Bank of California, First Interstate Bank, Ltd., First Interstate Bank International, First Interstate Capital Markets Limited, First Interstate Futures Corporation, First Interstate Investment Services, Inc., First Interstate Portfolio Lending Services, Harris Brefall Sullivan & Smith, Inc., The Karsten Companies, Inc., Leland O'Brien Rubinstein Associates Incorporated, Spoor Behrina Campbell & Young, Inc., Western Asset Management Company, First Interstate Public Finance Company, First

Interstate Treasury Services Limited, First Interstate Bank of Denver, N.A., First Interstate Bank of Englewood, N.A., First Interstate Bank of Fort Collins, N.A., First Interstate Bank of Idaho, N.A., First Interstate Bank of Glacier County, First Interstate Bank of Great Falls, First Interstate Bank of Kalispell, N.A., First Interstate Bank of Nevada, N.A., First Interstate Investment Advisers of Nevada, Inc., First Interstate Bank of Albuquerque, First Interstate Bank of Lea County, First Interstate Bank of Roswell, First Interstate Bank of Santa Fe, N.A., First Interstate Bank of Oklahoma, N.A., First Interstate Bank of Oregon, N.A., First Interstate International of Oregon, First Interstate Bank of Utah, N.A., First Interstate Bank of Washington, N.A., First Interstate International of

Washington, First Interstate Bank of Laramie, N.A., First Interstate Bank of Riverton, N.A., Commercial Alliance Corporation, First Interstate Capital, Inc., First Interstate Equities Corporation, First Interstate Commercial Corporation, First Interstate Discount Brokerage, First Interstate Financial Services, First Interstate Leasing, Inc., First Interstate Lease Investments Corporation, First Interstate Mortgage Company, First Interstate Mortgage Company of Texas, First Interstate Mortgage Acceptance Company, First Interstate Mortgage Company of Illinois, First Interstate Services Company, First Interstate Trading Company, First Interstate Venture Capital Corporation, First Interstate Cogeneration Capital Associates, First Interstate Corporate Finance Associates, First Interstate

Resource Finance Associates, Results Consulting Group, First Interstate System, Inc., First Interstate Bank of Alaska, First Golden Bancorporation, First Interstate Bank of Arvada, First Interstate Bank of Centennial, First Interstate Bank of Golden, First Interstate Bank of Westminster, N.A., First Interstate Bank of Hawaii, First Interstate Bank of Northern Indiana, First Interstate of Iowa, Inc., First Interstate Bank of Algona, First Interstate Bank of Cresco, N.A., First Interstate Bank of Des Moines, N.A., First Interstate Bank of Estherville, First Interstate Bank of Fort Dodge, First Interstate Bank of Greenfield, First Interstate Bank of Kalona, First Interstate Bank of Marengo, First Interstate Bank of Mason City, First Interstate Bank of Sigourney, First

Interstate Bank of Sioux City, First Interstate Bank of Spencer, First Interstate Bank of Urbandale, First Interstate Information Systems of Iowa, Inc., First Interstate Equipment Leasing of Iowa, Inc., First Interstate Insurance Services of Iowa, Inc., First Interstate Agri-Credit Corporation of Iowa, First Interstate BancSystem of Montana, Inc., First Interstate Bank of Billings, N.A., First Interstate Bank of Billings Heights, First Interstate Bank of Colstrip, First Interstate Bank of Hardin, First Interstate Bank of Miles City, First Interstate Bank of West Billings, First Interstate Bank of Missoula, First Interstate Bank of Farmington, First Interstate Bank of Fargo, First Interstate Bank of Wisconsin, Commerce BancShares of Wyoming, First Interstate Bank of

Sheridan, First Interstate Bank of Buffalo, First Interstate Bank of Gillette, First Interstate Bank of Sugarland, First Interstate Bank of Greybull.

Citibank, N.A., is wholly owned by Citicorp and is affiliated with Citibank (New York State) N.A., C. I. R. I. Corportion, Citicorp Information Resources, Inc., Mutual Data Systems, Inc., Citicorp Diners Club Inc., Airport Sales Corp., Automotive Charge Services, Inc., BT Publications, Inc., Carte Blanche International Ltd., Carte Blanche Merchandising Company, Carte Blanche Travel, Inc., CDC Realty Corp., Consolidated Collectors, Inc., Diners Agency Services Corp., Diners Club Gift Services Corp., Diners Colorado Realty Corp., Diners Executive Shopping Service, Diners Financial Corporation, Diners World Travel, Inc., Fugazy Philadelphia, Inc., Six Sixty Shop, Inc., Travelco, Inc., DQM Corporation, Financial Services, Inc., Prestige Gifts, Inc., Citicorp Homeowners

Services, Inc., Transaction Technology, Inc., Klaka Corporation, Citicorp Banking Corporation, Citicorp Digital Exchange, Inc., Citicorp Holdings, Inc., Citibank Delaware, Citibank (Maryland), National Association, Citibank (Nevada), National Association, Citibank (South Dakota), N.A., Citibank (Utah), Citicorp (Maine), Great Western Bank & Trust, Citibank (Maine), National Association, Citicorp International Group, Inc., Asia Pacific Capital Corporation Limited, Citicorp Capital Markets S.P.A., CitiBourse S.P.A., Cititrust S.P.A. - Instituto Fiduciario, Citicorp International Bank, S.A., Citicorp International Holdings, Inc., Citicorp Capital Investors Australia Limited, Advanced Communications Australasia Pty. Limited, Advanced Communications Australasia Unit Trust, Alytus

Pty. Limited, Cochlear Pty. Limited, Computations Proprietary Limited, Computations Unit Trust, Netlink, Inc., Scitec Communication Systems Limited, Techcom Australia Pty. Limited, Third Nettebin Limited, Citicorp Capital Investors Europe Limited, Advanced Technical Systems Limited, Agricultural Technology Limited, Airship Industries Limited, Beauty International Fragrances Limited, Bio-Europe S.A., Birmingham Beagles Limited, BJM Research Partners Group Limited, Bytex Holdings Limited, Corbit AG Computer-Und Prozessautimatisierung Gesellschaft Fuer Entwic, Cundell Group Limited, Data Magnetics Limited, Data Type International Limited, David S. Smith (Holdings) P.L.C., Defence Technology Enterprises Limited, Digipress S.A., Dumenil-Leble S.A., Elga Group Limited,

Epta Entreprise De Protection Et De Technique D'Assistance, European Industrial Services Limited, Giftworld Holdings Limited, Gooding Group Limited, Haden Group P.L.C., Hugin Group P.L.C., IMP Europe Limited, Information Technology Limited, Instem Holdings Limited, Integrated Ceramic Compenents Limited, Integrated Power Semiconductor Holdings Limited, Isis Industrial Services P.L.C., John Howard & Company Limited, KDG (Holdings) Limited, Lease Contracts P.L.C., Lensfield Products Limited, Les Ateliers De Construction Du Nord De La France, Maccess Limited, Mainstay Computer Cover Limited, Mallinson-Denny Group Limited, Mangers Holdings Limited, Materiaux Service S.A., Microbial Resources Limited, Mikron Gesellschaft Fuer Integrierte Mikroelektronik MBH, NDL International

Limited, Nestor-BNA Limited, Paragon Group Limited, Pickwick Group Limited, Pilostar Limited, Progen GMBH, Research Machines Limited, S.A.C.S.A. Societe Anonyme Des Chaussures, Servon International Limited, Smallbone P.L.C., Technitron Holdings Limited, Tip-Europe Limited, Verson International Group Limited, Viscose Closures Limited, Wades Group of Companies Limited, Wallbridge Holdings Limited, Wiltminster Limited, Wold P.L.C., Xenotron Public Limited Company, Citicorp Capital Investors Germany Limited, Datagraph GMBH, Elogica Gesellschaft Fur Elektronik In Der Datenubertragung M.B.H., Citicorp Davy Delaware Inc., J & E Davy Holdings Limited, DKM Consultants Limited, J & E Davy, Vickers Da Costa (Holdings) Inc., Vickers Da Costa Limited, Bridge Management Guernsey Limited, Bridge

Personal Financial Services Limited, Citivic Nominees Limited, City Financial Administration Limited, Bridge Fund Managers Limited, City Financial Administration (Luxembourg) S.A., Unit Trust Accounting and Management Limited, Clarke Vickers (UK) Limited, Scrimgeour Vickers Services Limited, Vickers, Da Costa & Co. Hong Kong Limited, Bridge International Management Limited, Citivic Overseas Nominees Limited, Vickers Da Costa & Co. Bahamas Limited, European Overseas Issuing Corporation S.A., Vickers Da Costa Futures Limited, Vickers Da Costa Hong Kong Securities Co. Limited, Vickers Da Costa International Limited (Hong Kong), Bridge Management (C.I.) Limited, Bridge Management Limited, United Fund Managers Limited, International Investment Trust Company Limited, Normandy Trust Company

Limited, Vickers Da Costa (B) Senderian Berhad, Vickers Da Costa International Limited (Guernsey), Vidacos Nominees (CI) Limited, Vickers Da Costa Overseas Limited, Auric Limited, Vickers Da Costa Securities PTE. Limited, Fraser Vickers Research PTE. Limited, Vidasing Nominees PTE. Limited, Vihong Nominees Limited, Vickers Da Costa (Luxembourg) S.A.R.L., Vickers Da Costa Securities (Holdings) Inc., Vickers Da Costa Scurities Inc., Vickers Da Costa Securities (Holdings) Inc., Citicorp International Limited, International Investment Trust Company Limited, Citicorp International Limited, Citicorp Investment Bank Denmark A.S., Citicorp Investment Bank Limited, Citicorp Scrimgeour Vickers Securities Limited, Citicorp Venture Capital Limited, Industrialization Fund of Finland, Purcoil (one) Limited, Purcoil

(Two) Limited, Scrimgeour Vickers & Co., City Financial Administration (Nominees) Limited, Heathview Nominees Limited, Kemp-Gee & Co. Limited, Kemp-Gee Holdings (Jersey) Limited, Kemp-Gee Nominees Limited, Leonine Administration Limited, Opclear Limited, P.N.Kemp-Gee & Co. Limited, P.N.Kemp-Gee Service Company, Scrimgeour Financial Services Limited, Scrimgeour Kemp-Gee Management (Hersey) Limited, Scrimgeour Retirement Services Limited, Scrimgeour Vickers (Asset Management) Limited, Scrimgeour Vickers (Corporate Finance) Limited, Scrimgeour Vickers Financial Futures Limited, Scrimgeour Vickers Financial Services Limited, Scrimgeour Vickers Insurance Brokers Limited, Scrimgeour Vickers (Investment Management) Limited, Scrimgeour Vickers Nominees Limited, Scrimgeour Vickers Research Services

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Bank KGAA, Matrix Ltd., Taiwan First Investment & Trust Co., Ltd., Coqui Investments, Inc., Cosmopolitan Realty Corp., Credit Guarantee Corporation Malaysia Berhad, Cuban American Nickel Company, Moa Bay Mining Company, The Development Bank of Singapore Limited, Fame Software Corporation, Fast-Pic Photos Corp., The First National City Bank of New York (Nigeria) Limited, Flora Mir Candy Corp., Fluidic Industries, Inc., Fonocob Realty Corporation, Gladding Corporation, Groupement d'Interet Economique "Paris Citicorp Center," Growth Realty Companies, Grupo Pliana, S.A. de C.V., Henson Associates Limited, Industrial Credit and Investment Corporation of India Limited, The Industrial Finance Corporation of Thailand, International Banking Corporation, International Bank

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S.A., Citibank Espana S.A., Citifin Espana, S.A. De Financiacion, Inmobiliaria Jiennense, S.A., Citibank Finance Limited, Citibank Financial Trust Limited, Citibank Leasing Limited, Citibank Trust Limited, Default and Debt Recovery Services Limited, Storecard Limited, Citicorp Finance P.L.C., Citifutures Limited, Diners Club Limited, Cardholder Services Limited, J.N. Travers & Co. Limited, Channel Collections Limited, D.C.F. Services Limited, Diners Club Limited (Ireland), Diners World Travel Limited, Citicorp Venture Capital S.A., Citicorp Y Rio - Banco De Inversion, S.A., Citidatos S.A., Citidealings Limited, Citifinance Limited, Citifinanciera, S.A., Citi-Info, S.A. De C.V., Citilease Internacional, S.A., Citilease, S.A., MTSE Operations Centre N.V., Omnicenter

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Ltda., Apetik-Refeicoes Convenio Ltda., Crefisul Comercio E Exportacao Ltda., Sulina-Participacoes E Servicos Lyda., S.N. - Crefisul S.A.-Distribuidora De Titulos E Valores Mobiliarios, S.N.- Crefisul S.A.-Sociedade Corretora, Citibank Leasing S.A. - Arrendamento Mercantil, Citibank Metais Ltda., Citibank Internacional, Participacoes, Administradora E Consultoria Ltda., Celanese Brasileira S.A., Digitel S.A. Industria Eletronica, Creditcard S.A. - Administradora De Cartoes De Credito, Diners Club Do Brasil Cartoes De Credito Ltda., Esquilla Participacoes E Empreendimentos S.A., Omnia Empreendimentos E Participacoes Ltda., Citibank Corretora De Seguros S.A., Orion Empreendimentos Comerciais Ltda., Riba - Representatoces Participacoes E Administracao Ltda., Banco Crefisul De

Investmento S.A., Sitrio Empreendimentos Imobiliarios Ltda., GD Empreendimentos Imobiliarios Ltda., Technologia Bancaria S.A., FNC - Corretora De Titulos E Valores Mobiliarios S.A., Foremost Investment Corporation, Fuyo General Lease Co., Ltd., Chiba General Lease Co., Ltd., Dai-Fuji General Lease K.K., Doyu Shoji, Inc., FGL Investment Co., Ltd., F. G. L. Service Co., Ltd., FLK Co., Ltd., Fujigin Factors, Ltd., Fuyo Lease Company Ltd., Fuyo (Panama) S.A., Ace Pacific Navigation Co., S.A., Alpha Pacific Maritime Co., S.A., Beta Pacific Shipping Corp., S.A., Brightfaith Navigation S.A., Flores Tankers Limited, Gamma Pacific Maritime Co., S.A., Global Ocean Co., Limited, Jupiter Navigation Company S.A., Pioneer Atlantic Navigation Co., S.A., Rose Leaf Navigation Co., S.A., Rose Root

Navigation Co., Limited, Rose Wood Navigation Co., S.A., Sun Lotus Navigation Co., S.A., Grand Yamagata Lease Co., Limited, Higo General Lease K.K., Hokuetsu Leasing Co., Limited, Japan Dental Loan Service, Limited, Shikoku General Lease K.K., Showa Financing KK, Tamashin Lease Co., Limited, Inarco International Bank N.V., C.A. Cervecera Nacional, Informacion Computada S.A., Interco (Intermediaciones Comerciales) S.A., International Finance Associates, B.V., Inversiones Citicorp-Chile S.A., Capital Investments Corporation Chile S.A. Corredores De Bolsa, Citicorp-Chile Casa De Cambio S.A., Citicorp-Chile S.A. Administradora De Fondos Mutuos, Citicorp-Chile S.A. Agente De Valores, Inversiones Citicorp Peru S.A., Inversiones Y Adelantos, C.A.,

Arrendequipos, Empresa De Arrendamento Financiero, C.A., Citidata, C.A., Jersey Corporate Trade Services Limited, Cinque Management A.G., Primus Nominees (Jersey) Limited, Tertius Nominees (Jersey) Limited, Korea Long Term Credit Bank, Kuala Lumpur Commodities Clearing House, Langross Carriers, Inc., National Finance and Investment SAL, Nessus Investment Corporation, Citibank Limited, Citibank Savings Limited, Citicorp Capital Markets Australia Limited, Aughnacloy Pty. Limited, Austraclear Limited, Carrigart Pty. Limited, Citicorp Finance and Securities Pty. Limited, Citicorp Nominees Pty. Limited, Citisecurities Limited, Clarke Vickers Limited, Clarke Vickers Services Pty. Limited, Clarke Vickers Services Pty. Limited, Consolidated Press Securities Limited, Dalgety Rural

Finance Limited, Impact Systems Limited, Rinona Pty. Limited, Sydney Futures Exchange Limited, Tundoors Pty. Limited, Citicorp Card Services Limited, Tupuna Pty. Limited, Tupuna Unit Trust, Citicorp Limited, Citicorp Australia Limited, Austraclear Limited, J.J. Finance Pty. Limited, Norper Investments Pty. Limited, Straits Oil and Gas Limited, Citicorp Canberra Pty. Limited, Citicorp Finance Pty. Limited, Cambridge Credit Corp., Citicorp Financial Services Limited, Citicorp General Insurance Limited, Gas & Fuel Corporation of Victoria, Citicorp Insurance Brokers Limited, Citicorp Investments Limited, Citicorp Life Insurance Limited, Citicorp Wholesale Pty. Limited, Citicorp Management Services Limited, Samata Pty. Limited, Hellenic Investment Company, S.A.,

Nigeria International Bank, Limited, Nostro Investment Corporation, Pemlease, Inc., Private Export Funding Corporation, P.T. Citicorp Leasing Indonesia, Ripco S.A.C.I. Y F., Servicios Integrales, S.A., Corporacion Financiera Atlas, S.A., Tarjetas De Credito De Guatemala, S.A., Tarjetas De Credito De El Salvador, S.A., Tarjetas De Credito, S.A., Diners Club De Panama, S.A., World Corporate Trade Services Limited, Yonder Investment Corporation, Aspiration, Inc., 452 Realty Corp., 700 River Road Realty, Inc., 3325 Wilshire Blvd. Development Corp., A.B.E. Office Park Corp., AHG Annapolis, Inc., Alexandria Apartments Corp., Annamary Realty Corp., Ashland Town Real Estate Corp., Barceloa Apartments, Inc., Barrybrooke Real Estate Corp., Barry Road Tennis Club, Inc., Bay Point Land

Corp., Berk-Lan Development Company, Inc., Brake-Lan Development Company, Inc., Brookfield Realty, Inc., California Village Place, Inc., Camelot Properties Inc., Carrollon Realty, Inc., Carrollton Realty Corp., Citadel Realty Corp., Clair-Del Gardens Realty Inc., Country Square Associates Inc., County Fair Realty, Inc., Crooked Creek Real Estate Corp., CWE Realty Estate Corp., Davie Land Realty Inc., Daywhit Realty Corp., Deltona Shares Associates, Inc., De Ville Development Corp., Drexel Parc Realty Inc., East Point Towers Realty, Inc., Eastwood Estates Realty Inc., E.C. Properties, Inc., Fairoaks Realty, Inc., Fawy Realty, Inc., Flem-lan Development Company, Inc., Fonocob, Inc., Fox Real EState Associates Inc., FTT Real Estate Associates inc., Gainesville Mall Development Corp., Gateway Square Real

Estate Corp., GG Development Corp., GHB Realty, Inc., Gilata Properties, Inc., GPP Enterprises, Inc., G.R.H. Development Company, Inc., Hakai Real Estate Corp., H.C. Properties, Inc., Henderson Gardens Inc., Hunter's Hill Real Estate, Inc., Hunting Towers Development Corp., HWV Properties, Inc., IBG Properties, Inc., I.C.P. Holding Corp., INTC Properties, Inc., Ivanhoe Properties Corporation, Jackson-Metedeconk, Inc., Jackson-Progress Place, Inc., Kensington Real Estate Corporation, Kirby Farms Development Corp., K W. Resort Holdings Corp., KW Resort Construction Corp., KW Resort Development Corp., KW Resort Golf Course Corp., KW Resort Marina Corp., KW Resort Utilities Corp., Lafourche Properties Management Properties, Inc., Lake Diamondhead Properties, Landover Realty

Company, Inc., Lan-Fair Development Company, Inc., Lan-Hill Development Company, Inc., Lan-Mid Development Company, Inc., Lan-My Properties, Inc., Lan NJ Properties, Inc., Lansdowne Properties Inc., Lasmar Properties Inc., Lebanon Propeprties Inc., Mant-Lan Development Company, Inc., Maria Real Estate Inc., McAllen Condominium Corporation, Meadow-Lan Development Company, Inc., Meadowview Utilities Company, Mill-Lan Development Company, Inc., Mt. Juliet Utilities Corp., Myld Properties, Inc., Mystic Properties Corporation, 1099 Associates, NBG Properties, Inc., Neighborhood Properties Inc., Nejer Development, Inc., Nejer Properties, Inc., Nejer Realty, Inc., New Brunswick Development Corp., Ocean Associates Inc., Old Mill Apartment Corporation, P & PR

Development Corporation, Palms Among the Fountains, Inc., Pan Realty, Inc., Park Land Development Corp., P.G.H. Realty Corp., Playland Realty Associates Inc., PNHST Enterprises Inc., P.T. Realty Corp., Raintree Real Estate Corporation, Raintree Corp., Raleight Square Realty Inc., Red Schoolhouse, Inc., Regency Associates Inc., River Bend Realty Inc., River Mill Realty, Inc., Royal Oaks Realty, Inc., Rvrd Realty Inc., Saddle Creek Realty, Inc., Salt Real Estate Corp., S-BKHN Associates, Inc., Schultz Properties, Inc., Scripps Mesa Properties, Inc., Seascape of Bonita Beach, Inc., Seascape Realty Corp., S-Enterprises Inc., Southern Syndicate, Inc., SGM Properties, Inc., Sherwood Forest Realty Inc., SHLT Real Estate Inc., SHRS Holding Corp., SJK Enterprises, Inc., The South 10th Street

Corporation, Southeast Holding Company, Ltd., Southwind Development Co., Inc., SP Cove Properties Corp., Cove Club of Perdido Bay Inc., SCWS Enterprises Inc., Stanglan Realty Company, Inc., STCH Associates Inc., Steam Realty Corp., Stone Mill Real Estate Corporation, Stork Oil Properties, Inc., Sunmark Properties, Inc., Susan Real Estate Corp., Terracon Properties, Inc., Tiffany Land Co., Inc., Uri-Florida Properties, Inc., Village II, Inc., Village Square Development Corporation I, V.S.T.A. Real Estate Associates Inc., W.D. Realty Corp., Welithom Realty, Inc., Wichita Development Company, Wind Mall Realty Inc., Winlan Realty Inc., Woodstream Real Estate Corporation, Bodin Investments Limited, Capital Markets Sources, Inc., Central Capital Markets Sources, Inc., Citicorp Data

Distribution, Inc., DFIB, Inc., Citibelsa-Assurantiemaatschappij Financia Compagnie D'Assurances Finan, Europa Financia Limited, Citicorp Capital Investors Ltd., Citicorp International Capital, Ltd., Petroquimica Uniao, S.A., South American Placers Inc., Citicorp Community Development, Inc., Broadgo, Inc., 808 Broadway Associates, Garp, Inc., Garfield Restoration, Krabco, Inc., Schuyler Associates, Mission Park Corporation, Pilot Equities, Inc., Pimat, Inc., Boerum Court Associates, Citicorp Credit Services, Inc., Citicorp Data Systems Incorporated, Citicorp Delaware Services, Inc., Citicorp Export Credit Corporation, Citicorp Financial Services, Inc., Newbridge Securities, Inc., Citicorp Funding, Inc., Ccc Futures Corporation, Citicorp Futures

Limited, Citicorp Industrial Credit, Inc., Adv One, Inc., Adv Three, Inc., Adv Two, Inc., Asset D Vehicle, Inc., Citicorp Business Credit, Inc., Citicorp Churchill Lease, Inc., Citicorp Global Lease, Inc., Citicorp Omega Lease, Inc., Citicorp Sierra Lease, Inc., Citicorp Translease, Inc., Citicorp Leasing (Alyeska), Inc., Citicorp Lescaman, Inc., Citicorp Nachtwacht Lease, Inc., Citicorp Petrolease, Inc., Citicorp Tulip Lease, Inc., Citimarlease (Burmah I), Inc., Citimarlease (Burmah Liquegas), Inc., Citimarlease (Burmah Lng Carrier), Inc., Citimarlease (Fulton), Inc., Citimarlease (Whitney), Inc., Citimex Lease, Inc., Harrison Credit Group, Inc., HCG Services, Inc., Sperry New Holland Credit Corporation, Parker Properties, Inc., S.P.A., Inc., S.P.L., Inc., United General

Corporation, Citicorp Information Systems Research, Inc., Citicorp Insurance Group, Inc., Citicorp Insurance (Bermuda) Limited, Citicorp Insurance Holdings Limited, Brandts Clark Marine Limited, Citibank Financial Consultants Limited, Citicorp Construction Limited, Citicorp Insurance Brokers (International) Limited, Citicorp Insurance Brokers Limited, Financial Institutions Insurance Brokers Limited, Citicorp Insurance Brokers (Singapore) Pte. Ltd., Citicorp Underwriting Agencies Limited, Citicorp Insurance (USA), Inc., Citicorp Insurance Services Limited, British National Life Assurance Company Limited, BNL Trustees Limited, British National Life Sales Limited, Citibank Assurance Company Limited, Argyll Group P.L.C., Arthur Guinness & Sons P.L.C., BPB

Industries P.L.C., Brent Chemicals International P.L.C., Brent Walker Holdings P.L.C., British Aerospace P.L.C., BTR P.L.C., Burton Group P.L.C., Costain Group P.L.C., Dawson International P.L.C., Etam P.L.C., Farnell Electronics P.L.C., Flight Refuelling (Holdings) P.L.C., Fuller, Smith & Turner P.L.C., General Funds Investment Trust P.L.C., Glaxo Holdings P.L.C., Hanson Trust P.L.C., Hawthal Whiting Holdings P.L.C., Hepworth Ceramic Holdings P.L.C., Hewden-Stuart Plant P.L.C., Imperial Chemical Industries p.L.C., Investing in Success Equities P.L.C., J. Hepworth & Son P.L.C., J. Sainsbury P.L.C., Microgen Holdings P.L.C., Oxford Instruments P.L.C., Pearson P.L.C., Ransomes Sims & Jefferies P.L.C., Renishaw P.L.C., Ricardo Consulting Engineers P.L.C.,

Rosehaugh P.L.C., Royal Insurance P.L.C., Saatchi & Saatchi Co. P.L.C., Sedgwick Group P.L.C., Stead & Simpson P.L.C., Tarmac P.L.C., Vantona Viyella P.L.C., Citibank General Insurance Company Limited, Citicorp International Communications, Inc., Citicorp International Trading Company, Inc., American Technology Corporation, Limited, Citicorp American Technology Corporation, Citc Comercial Exportadora Ltda., Citc-Uruguay S.A., Citicom De Mexico, S.A. de C.V., Citicorp Aviation Industry Resources, Inc., Citicorp International Trade Services Company, Inc., Collateral Trust Corporation Limited, Citicorp International Trading Company (Guam), Inc., Citicorp International Trading Company Sdn. Bhd., Tapco, Inc., Citicorp Investment Banking (Luxembourg) S.A., Cedel, S.A., Citicorp

Investment Bank (Switzerland), Citicorp Investment Management, Inc., Citicorp Marketing Consulting, Inc., Citicorp Overseas Finance Corporation Limited, Citicorp Overseas Finance Corporation N.V., Citicorp Person-to-Person, Inc., Citicorp Acceptance Company, Inc. (Delaware), Citicorp Acceptance Company, Inc. (Alabama), Citicorp Acceptance Company, Inc. (Nevada), Citicorp Acceptance Company, Inc. (New Mexico), Citicorp Acceptance Company of California, Inc., Citicorp Financial Center, Inc. (Kansas), Citicorp Financial Center, Inc. (Michigan), Citicorp Financial Corporation, Citicorp Financial, Inc., Citicorp Financial Services Corporation (Kentucky), Citicorp Financial Services Corporation (Tennessee), Citicorp Homeowners, Inc., Advance Properties Corporation, Amcal

Mortgage Corporation, C.H.I. Corporation, Citicorp Homeowners Mortgage Acceptance Corporation 1, Inc., First Mortgage Corporation, Insured Funding Corporation, Spar, Inc., Tretop, Inc., Citicorp Mid-Atlantic, Inc., Citicorp Mortgage Corporation, Citicorp Person-to-Person Corporation, Citicorp Person-to-Person Financial Center, Inc. (Florida), Citicorp Person-to-Person Financial Center of Florida, Inc., Citicorp Person-to-Person Financial Center (Utah), Citicorp Person-to-Person Financial Center, Inc. (Alabama), Citicorp Person-to-Person Financial Center, Inc. (Colorado), Citicorp Person-to-Person Financial Center, Inc. (Delaware), Citicorp Person-to-Person Financial Center, Inc. (Georgia), Person-to-Person Insurance Agency, Inc. (Louisiana), Citicorp Person-to-Person

Financial Center, Inc. (Missouri), Citicorp Person-to-Person Financial Center, Inc. (North Carolina), Citicorp Person-to-Person Financial Center of Connecticut, Inc., Citicorp Person-to-Person Financial Center of Idaho, Inc., Person-to-Person Insurance Agency, Inc. (Idaho), Citicorp Person-to-Person Financial Center of Illinois, Inc., Citicorp Person-to-Person Financial Center of Nebraska, Inc., Citicorp Savings Company (Nebraska), Citicorp Person-to-Person Financial Center of Utah, Citicorp Person-to-Person Financial Services, Inc., Citicorp Person-to-Person Mortgage Corporation (Ohio), Citicorp Savings, a Federal Savings and Loan Association, Citicorp Acceptance Services Corporation (California), Citicorp Savings Service Corporation, Citicorp Savings and

Industrial Bank, Citicorp Savings and Industrial Bank of Boulder, Citicorp Savings and Industrial Bank of Colorado Springs, Citicorp Savings and Industrial Bank of Denver, Citicorp Savings and Industrial Bank of Fort Collins, Citicorp Savings and Industrial Bank of Littleton, Citicorp Savings and Industrial Bank of Northglenn, Citicorp Savings and Industrial Bank of Southwest Plaza, Citicorp Savings Company (Minnesota), Citicorp Savings of Florida, a Federal Savings and Loan Association, Citicorp Acceptance Service Corporation (Florida), Citicorp Savings Mortgage Company of Florida, Citicorp Savings of Illinois, a Federal Savings and Loan Association, Bronze Tree Holdings, Ltd., Camco Management, Inc., Park Plaza Holdings, Inc., Citicorp Acceptance Service Corporation

(Illinois), Citicorp Savings Insurance Agency, Inc., Dearborn Park Corporation, Efts Service Corporation, Efts Service Corporation II, Federated Assurance Company, Financial 1st Corporation, First Savings Corporation, Appraisal Services, Inc., B.B.C., Inc., Brickell Biscayne Associates, The Dorchester on Rittenhouse Square Partners, Eagle II, Euclid Commercial Joint Venture, Euclid Golf Joint Venture, First Hemphill, FSC Development Corp., Park West Construction Company, Kingsbrooke Co., Lake Terrace Associates, The Lexington Commons, The Lexington Village, Marine Partners, Oak Forest Company, Olive Trees Venture, Partridge Hill Company, Rob Roy Country Club Village, Woodglen Venture, Fountain Square Corporation, Greater Southwest Community Service Corp., I.S.C., Inc., Mid-City Building

Corp., Network Eft., Inc., The Savings & Loan Network, Inc., St. Michael's Holdings, Ltd., Terrestris Holdings, Ltd., Ashford Holdings, Inc., Conco Holdings, Inc., Country Creek Holdings, Inc., Creekside Holdings, Inc., Esplanade Holdings, Inc., First Holdings, Inc., Orwood Holdings, Inc., Pinebrook Holdings, Inc., Stockbridge Farm Holdings, Ltd., Terrestris Development Company, Williamsburgh Holdings, Inc., Windmere Holdings, Inc., Western Trails Venture, West Suburban Investments, Inc., 200 West Holdings Corp., Beach Cottages Holdings, Lted., Inc., Beach Cottages Holdings #2, Inc., Cabana Club Holdings, Inc., Equity Holdings, Inc., Financial Reserve, Incorporated, First Paddle Creek, Inc., Paddle Creek Enterprises, Inc., Forest Creek Holdings, Lted., FRMC Corporation,

Land Trust #5018, Magnolia Springs Management, Inc., Mohoco, Ltd., Padhoco, Inc., Torian Plum Holdings, Lted., Trappeur's Holdings, Ltd., West Florida Investments, Inc., Bay Forest Lot 20, Coastal Properties of Naples, Inc., Meridian Partnership Ltd., West Suburban Investments, Inc. of California, West Suburban Investments, Inc. of Colorado, CE Holdings, Inc., Colorado Equity Holdings, Inc., West Suburban Investments, Inc. of Steamboat Springs, West Suburban Investments of Maryland, Inc., Winterpoint Holdings, Ltd., Citicorp Savings of Washington, D.C., A Federal Savings and Loan Assoc, Citicorp Financial Services Corporation (D.C.), Camelot Partnership, Goldsboro Joint Venture, Metro II Associates Limited Partnership, The Tiers of Laurel Lakes Limited Partnership, Woodleigh Limited

Partnership, Citicorp Insurance Agency, Inc., Citicorp Mortgage Services Corporation, Eastern Service Corporation, Citicorp Washington Financial Center, Inc., Citicorp Washington Industrial Loan Company , Citicorp Washington Insurance Agency, Inc., Family Guardian Life Insurance Company, Family Guardian Life Insurance Company of New York, Person-to-Person Insurance Agency, Inc. (Alabama), Person-to-Person Insurance Agency, Inc. (Arizona), Person-to-Person Insurance Agency, Inc. (California), Person-to-Person Insurance Agency, Inc. (Colorado), Person-to-Person Insurance Agency, Inc. (Connecticut), Person-to-Person Insurance Agency, Inc. (Florida), Person-to-Person Insurance Agency, Inc. (Georgia), Person-to-Person Insurance Agency, Inc. (Illinois), Person-to-

Person Insurance Agency, Inc. (Indiana), Person-to-Person Insurance Agency, Inc. (Missouri), Person-to-Person Insurance Agency, Inc. (Montana), Person-to-Person Insurance Agency, Inc. (Nevada), Person-to-Person Insurance Agency, Inc. (New Mexico), Person-to-Person Insurance Agency, Inc. (Ohio), Person-to-Person Insurance Agency, Inc. (Oregon), Person-to-Person Insurance Agency, Inc. (South Carolina), Person-to-Person Insurance Agency, Inc. (South Dakota), Person-to-Person Insurance Agency, Inc. (Utah), Person-to-Person Insurance Agency, Inc. (Virginia), Person-to-Person Insurance Agency, Inc. (Wyoming), Citicorp Satellite Communication Services, Inc., Citicorp Securities, Inc., Citicorp Services Inc., Citicorp Technology Services, Inc., Citicorp (USA), Inc., Hyster Company, Citicorp Videotex

Services, Inc., CNR Partners, Citidel, Inc., Citiexchange, Inc., Citiflight, Inc., Citimortgages, Inc., Citinvest Ecu Income S.A., Citinvest Liquidity S.A., Citinvest Managed Growth S.A., Citishare Corporation, Cititreasury, Inc., Digital Radio Networks, Inc., Q Acquisition Corp., Quotron Systems, Inc., Securities Industry Software Corporation, Quotron Systems International, Inc., AP-Dow Jones/Quotron Company, Quotnet A.G., Quotnet (France) S.A.R.L., Quotnet G.M.B.H., Quotnet (Hong Kong) Limited, Quotnet Services Limited, Quotnet Services (Singapore) Pte. Limited, Quotnet (U.K.) Limited, Quadstar Corp.

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-487

IN THE

Supreme Court of the United States

October Term, 1987

WYOMING COMMUNITY DEVELOPMENT AUTHORITY, FIRST INTERSTATE BANK OF CAPSER, N.A., and CITIBANK, N.A.,
Petitioners,

v.

MARVIN B. DURNING and JEAN C. DURNING, husband and wife, on behalf of themselves, and all other persons similarly situated,
Respondents.

JOINDER OF RESPONDENT THE FIRST BOSTON CORPORATION IN PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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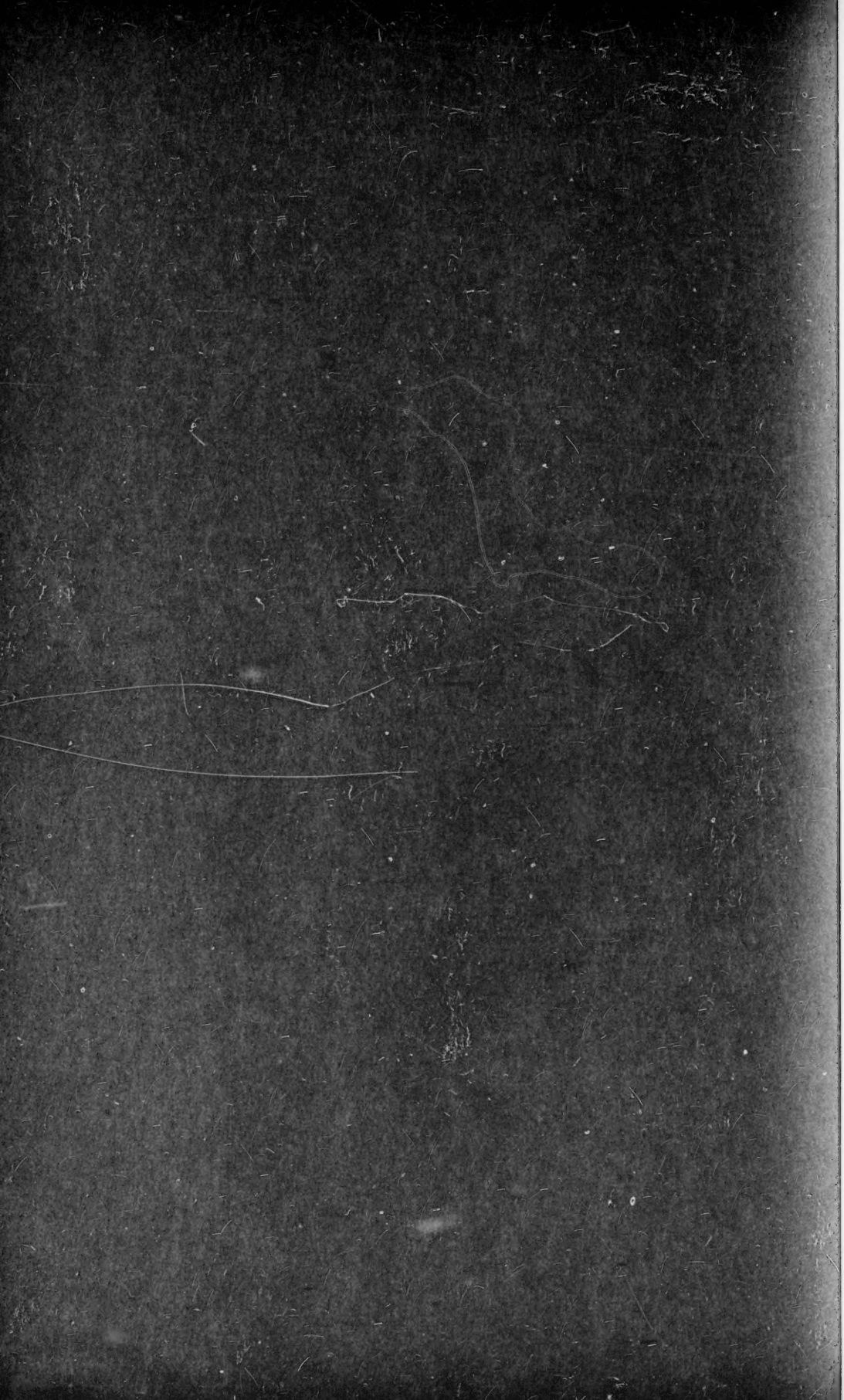
October 12, 1987



Respondent, The First Boston Corporation, joins in the Petition by Wyoming Community Development Authority, First Interstate Bank of Casper, N.A., and Citibank, N.A. for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

DATED this 24th day of October, 1987.

PRESTON, THORGRIMSON, ELLIS & HOLMAN

By Hugh F. Bangasser
Hugh F. Bangasser
Attorneys for Respondent, The First Boston Corporation

APPENDIX I

Rule 28.1 List

The First Boston Corporation is wholly owned by First Boston, Inc. and is affiliated with BOS Holding Corp., Bostonian Properties Company, Inc., Clipper Fifth Avenue, Inc., Clipper Holdings, Inc., Clipper Manhattan, Inc., Clipper Midtown, Inc., Clipper Park Avenue Leasing Corporation, Clipper South Shore, Inc., Clipper Stone, Inc., Clipper Sutton, Inc., Eastside New York, Inc., FBCC Holdings, Inc., FBGP Inc., FB MTP, Inc., FBT, Inc., FB Advisory Services, Inc., FB Alternate Energy Corporation, FB Countertrade Advisory Corporation, FB Energy Corporation, FB Holdings, Inc., FB Holdings II, Inc., First Boston Acquisition Corporation, First Boston Asset Management Corporation, The First Boston Capital Group Inc., First Boston Docklands Associ-

ates, Inc., First Boston Funding Corporation, First Boston Futures Inc., First Boston Global Holdings, Inc., First Boston Holdings, Inc., First Boston International Limited, First Boston LBO, Inc., First Boston Overseas Finance, N.V., First Boston Real Estate and Development Corporation, First Boston Securities Corporation, Pacer Capital, Inc., Sunter Holdings Corporation, Sky Clipper, Inc.

FILED
OCT. 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-487

IN THE

Supreme Court of the United States

October Term, 1987

WYOMING COMMUNITY DEVELOPMENT AUTHORITY, FIRST INTERSTATE BANK OF CASPER, N.A., and CITIBANK, N.A.,

Petitioners,

v.

MARVIN B. DURNING and JEAN C. DURNING, husband and wife, on behalf of themselves and all other persons similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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October 21, 1987

[illegible] Legal Printers, Seattle, WA

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IN THE

Supreme Court of the United States

October Term, 1987

WYOMING COMMUNITY DEVELOPMENT AUTHORITY, FIRST INTERSTATE BANK OF CASPER, N.A., and CITIBANK, N.A.,

Petitioners,

v.

MARVIN B. DURNING and JEAN C. DURNING, husband and wife, on behalf of themselves and all other persons similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents Marvin B. Durning and Jean C. Durning, on behalf of themselves and all other persons similarly situated, respectfully request that this Court deny the petition for certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit. That opinion is reported at 815 F.2d 1265.

STATEMENT OF THE CASE

In 1981, defendant Wyoming Community Development Authority ("the Authority") sold mortgage revenue bonds ("the Bonds") to a group of underwriters for distribution to the public (ER 30).[1]

Plaintiffs Marvin B. Durning and Jean C. Durning bought four Bonds in the principal amount of $5,000 each through their broker, Shearson/American Express ("Shearson") (ER 81).

An Official Statement (ER 30-73), a disclosure document equivalent to a prospectus, indicated that the Bonds could not be "called" (redeemed by the issuer prior to their maturity date) until at least 1991. By contrast, official statements for previous and subsequent bond issues of the Authority stated explicitly that those bond issues could be redeemed "at any time" (ER 78-80), but that statement had been deleted from the Official Statement for the Durnings' Bonds.

The Durnings and sophisticated members of the financial bond marketing community read the Official Statement to mean that the Bonds were not subject to redemption prior to 1991. MOODY'S MUNICIPAL & GOVERNMENT MANUAL, the leading source book on municipal bonds, described the Bonds as not callable before June 1, 1991. (ER 79.) The purchase confirmation record that the Durnings received from Shearson stated that the Bonds were "Callable 06/01/91." (ER 81.)

The Official Statement did not accurately disclose the terms of the Trust Indenture, which did in fact permit redemption in whole at any time or in part on any date on which interest is payable.

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[1] Citations denominated "ER" are to plaintiffs' complaint and attached exhibits in the Excerpts of Record on appeal to the Ninth Circuit.

In two redemptions in 1983 and 1985, the Authority redeemed a total of nearly $32 million of the Bonds. (ER 3.) One of the Durnings' Bonds was called in the 1985 redemption. (ER 18.) Coincidental with the 1985 redemption, the price of the Bonds in the secondary market dropped sharply. (ER 17-18.)

The Durnings filed a class action charging that the Official Statement did not inform investors the Bonds were redeemable prior to 1991. Plaintiffs attached as exhibits to their complaint the Official Statement, excerpts from MOODY'S MUNICIPAL & GOVERNMENT MANUAL, the purchase confirmation statement from Shearson, and the "sale" confirmation statement showing redemption of one of the Durnings' Bonds (ER 30 to 84).

The district court dismissed the complaint for failure to state a claim. *Durning v. The First Boston Corp.*, 627 F. Supp. 393 (W.D. Wash. 1986). The court held: (1) as a matter of law the Official Statement unambiguously disclosed that the Bonds could be redeemed prior to 1991, and (2) neither the Moody's or Shearson exhibits nor the Authority's treatment of similar redemption provisions in other issues were relevant to whether the Official Statement was misleading. (Pet. C-11-13.)

The Ninth Circuit reversed. *Durning v. The First Boston Corp.*, 815 F.2d 1265 (9th Cir. 1987). Applying the objective "reasonable investor" test, the Court of Appeals reviewed both ambiguous language in the Official Statement and the documents attached to the complaint indicating that even professional bond analysts and traders in the market had been misled by the Official Statement. The Court concluded:

> In reviewing the complaint and the Official Statement, we cannot conclude, as did the district court, that "reasonable minds cannot differ," *TSC Industries*, 426 U.S. at 450, as to whether a reasonable investor in reading

> this Official Statement would conclude that the bonds were callable prior to June 1, 1991. We hold that the Durnings have stated a claim under federal securities laws and that the trial court erred in deciding that the Official Statement was unambiguous as a matter of law.

(Pet. A-23-24.)

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Ninth Circuit's Decision Is Not In Conflict With Decisions of Other Circuits.

Petitioners concede that the Ninth Circuit Court of Appeals correctly adopted the objective "reasonable investor" standard for determining whether the Official Statement contained an adequate disclosure of the callability of the Bonds. (Pet. 12, 16.) Petitioners also concede that the legal standard relied upon by the Ninth Circuit is not in conflict with the decisions of other circuits.

Petitioners' only quarrel is with the Court of Appeals' application of that standard to the facts contained in the complaint and attached exhibits. The Ninth Circuit concluded that reasonable minds could differ on the question whether a reasonable investor would be misled by the Official Statement. Defendants disagree. That is not a ground for grant of certiorari under Supreme Court Rule 17.1(a).

a. The Court of Appeals Explicitly Adopted And Applied An Objective "Reasonable Investor" Standard.

Petitioners agree that the Court of Appeals correctly adopted an objective "reasonable investor" test for determining whether the Official Statement was misleading. (Pet. 3, 12, 16.) Petitioners argue that one sentence of the opinion indicates that the Court actually applied a subjective standard instead, because it referred to whether a reasonable investor "might" (rather than "would") be misled. (Pet. 12, 16.) The

contention is sheer fantasy and seriously mischaracterizes the Court's opinion.

The Court of Appeals repeatedly emphasized the necessity of an objective "reasonable investor" standard. The Court stated:

> To determine whether the Official Statement was misleading, we apply the "reasonable investor" test: whether an investor who had been reasonably diligent in reviewing the Official Statement *would* have been mislead [sic] as to the callability of the Bonds. *See Admiralty Fund v. Hugh Johnson & Co.*, 677 F.2d 1301, 1306 (9th Cir. 1982). *This is an objective test. Id.*

(Pet. A-14 (emphasis added).) The Court explained that it had adopted the same objective test to determine whether a fact is "material" because of the need for objective standards in both contexts:

> The application of the reasonable investor test is appropriate because adequacy of disclosure, like materiality, *only can be judged against an objective standard of investor behavior.*

(Pet. A-14-15 n.4 (emphasis added).)

The Court of Appeals then analyzed the application of that standard in the specific context of petitioners' Rule 12(b)(6) motion.

> Whether an Official Statement adequately discloses callability is a mixed question of law and fact. *Cf. TSC Industries*, 426 U.S. at 450. "The determination requires delicate assessments of the inferences a 'reasonable shareholder' *would* draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *Id.* Only if the disclosure is so obvious that reasonable minds cannot differ is the issue appropriately resolved as a matter of law. *Id.* Like materiality, adequacy of dis-

> closure is normally a jury question. *Admiralty Fund*, 677 F.2d at 1306.

(Pet. A-15-16. (Emphasis added.) The Court used the word "might" only in framing the resulting two-level inquiry (1) whether reasonable minds could differ as to (2) whether a reasonable investor would be misled as to the callability of the Bonds:

> A jury could conclude that a reasonable investor might fail to understand that the bonds are redeemable under this section whenever funds in the Account are sufficient.

(Pet. A-20.) The entire petition thus is falsely premised on a single word, taken wholly out of context, in the Court of Appeals' application of the concededly correct objective standard. Petitioners' contention that the Court of Appeals surreptitiously applied a "subjective" test instead is simply a sham.

b. The Court of Appeals Endorsed the Fifth Circuit's Decision in Associated Builders *And Distinguished The Decision On Its Facts.*

Petitioners contend the decision of the Court of Appeals is in conflict with the decision of the Fifth Circuit Court of Appeals in *Associated Builders, Inc. v. Alabama Power Company*, 505 F.2d 97 (5th Cir. 1974). (Pet. 20-21.) In that case the court, applying the same "reasonable investor" standard, found as a matter of law that a prospectus had adequately disclosed the mandatory redemption feature of certain bonds, and affirmed a dismissal of the complaint. 505 F.2d at 101-102.

In a crude effort to manufacture a conflict between the decisions of the Ninth and Fifth Circuits, petitioners simply omitted any reference to the Ninth Circuit's careful analysis of the *Associated Builders* decision. The Ninth Circuit sum-

marized the Fifth Circuit's decision, implicitly endorsed its holding, and determined that the facts of this case compelled a different result. (Pet. A-21-23.)

In distinguishing *Associated Builders*, the Ninth Circuit gave particular weight to the documents other than the Official Statement which were attached to the Durnings' complaint and which showed that even professional bond analysts had in fact been misled as to the callability of the Bonds. The Court of Appeals summarized the factual differences as follows:

> *Associated Builders* is distinguishable from this case. The central issue in both cases, whether the Statements adequately informed the investor of callability, is a fact specific inquiry, and the prospectus in *Associated Builders* differs significantly from the Official Statement at issue in this case. In *Associated Builders*, portions of the prospectus expressly notified the investor that the bonds were callable "at any time on 30 days' notice." There were no allegations of confusion on the part of experts comparable to the Moody's rating and Shearson American Express confirmation statements plaintiffs submitted in this case. The case at bar is not a case where the issue of adequate disclosure could be determined by a trial court as a matter of law.
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> In reviewing the complaint and the Official Statement, we cannot conclude, as did the district court, that "reasonable minds cannot differ," *TSC Industries*, 426 U.S. at 450, as to whether a reasonable investor in reading this Official Statement would conclude that the bonds were callable prior to June 1, 1991.

(Pet. A-22-23.)[2]

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[2] The Court of Appeals could also justifiably have relied on the Durnings' allegation of a sharp drop in the Bonds' value on the secondary market after the redemption, indicating that a substantial number of the persons and institutions comprising the market were similarly misled as to the redemption provisions.

(see next page)

There is no indication that the Fifth Circuit would reach any different result on these facts than the Ninth Circuit did. The asserted "conflict" between these circuits, arising solely from the courts' application of the same rule of law to different factual situations, is not a basis for certiorari. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts").

c. The Ninth Circuit Correctly Refused To Hold As A Matter Of Law That The Official Statement Adequately Disclosed Callability.

Petitioners apparently contend that a proper application of the objective "reasonable investor" test to plaintiffs' complaint required the Court of Appeals to hold as a matter of law that the Official Statement adequately disclosed the callability of the Bonds. Petitioners theorize that any reasonable investor would have known that the Authority needed to provide for extraordinary redemption in the event there is little demand for mortgage money or the mortgagees prepay their loans. (*See* Pet. 5-6.) For example, petitioners state that the district court "considered all of the terms of the Official Statement, *as well as the practical operation of a housing revenue bond program.*" (Pet. 21.) (Emphasis added.) Petitioners contend the Court of Appeals' "reading is unreasonable *in the context of this program.*" (Pet. 22 n.25.) (Emphasis added.) "If, however, a court were permitted to review plaintiffs' allegations and draw reasonable inferences *supported by the objective reality of the single-family mortgage revenue bond market* and the clear language of the Official Statement, plaintiffs' far-fetched reading could be dismissed as such." (Pet. 24.) (Emphasis added.) This Court should reject petitioners' contention, as did the Court of Appeals, for three reasons.

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Those allegations must be taken as true in determining the sufficiency of the Durnings' complaint. *E.g., Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In short, no one — other than the district court — appears to share petitioners' interpretation of the Official Statement.

First, petitioners' contentions consist of nothing but the unsupported argument of counsel. (*See* Pet. 5-7.) At this interlocutory stage there is no evidence or record to support any of petitioners' factual allegations concerning the operation of housing revenue bonds or what a reasonable investor would have known about them. Petitioners' selective quotations from hornbooks are no substitute for admissible evidence concerning the specific facts of this case.

Second, even assuming a "reasonable investor" would know that issuers of housing revenue bonds often reserve the right to redeem at any time, petitioners' theory supports rather than refutes the holding of the Court of Appeals. Such an investor presumably would look for a provision in the Official Statement that the Bonds could be redeemed at any time, a provision included in the official statements for all prior and subsequent bond issues by the Authority. The investor would not find it. The investor would place a correspondingly higher value on the Bonds (as the secondary market did in this case) because of the lack of a provision for such redemption.

Third, petitioners' argument that a reasonable investor would know the Bonds were callable at any time is in direct conflict with the Durnings' allegations that professional bond analysts as well as traders in the secondary market for the Bonds were in fact misled as to the callability of the Bonds. As this Court held in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), "These are questions we think best left to the trier of fact." 426 U.S. at 460.

2. This Case Presents No Important Unsettled Question of Federal Law.

Petitioners suggest the issue whether adequacy of disclosure should be tested by a "reasonable investor" standard is an "important question of federal law which has not been, but should be, decided by this Court." S. Ct. Rule 17.1(c). (Pet. 14, 15-16.)

Petitioners fail to explain why the Court should resolve that question in this case, where all the parties agree that the reasonable investor test should be applied.

Nor do the federal courts disagree. This Court has already applied the reasonable investor test to questions of materiality in *TSC Industries, supra*, and the circuits are consistent in extending that same standard to determination of the adequacy of disclosure.

3. The Durnings Are Entitled to An Award of Attorneys' Fees and Costs Against Petitioners' Counsel.

This Court has emphasized "the necessity for clear, definite, and complete disclosures concerning the controversy when applying for certiorari." *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). The petition does not meet that standard.

The petition mischaracterizes the Court of Appeals' holding by taking isolated words out of context, falsely implies that the Court of Appeals disagreed with or did not consider the Fifth Circuit's decision in *Associated Builders*, and deceptively omits any reference to the very documents and factual allegations on which the Court of Appeals expressly relied in concluding that a reasonable jury could find the Official Statement misleading.

There is in fact no reasonable basis for a grant of certiorari, and petitioners' counsel cannot have had any serious or good faith belief that the petition was justified. The Durnings are entitled to an award of their costs and attorneys' fees incurred in responding to the petition pursuant to 28 U.S.C. § 1927.[3]

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[3] 28 U.S.C. § 1927 provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

See, e.g. Chalfy v. Turoff, 804 F.2d 20, 23 (2d Cir. 1986) (award appropriate where appeal lacked any support in law or the record); *Jones v. Continental Corporation*, 789 F.2d 1225, 1230 (6th Cir. 1985) (fee award proper for frivolous claims or tactics that needlessly obstruct litigation).

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied with directions to the District Court to award respondents appropriate relief under 28 U.S.C. § 1927.

Respectfully submitted,

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